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WOLF LAW

Jesse Honig
David Takacs

ABSTRACT

Various populations of wolves have been listed as threatened or endangered under the U.S. Endangered Species Act since the 1970s. But no listed species has aroused, and continues to arouse, so much controversy as the Northern Gray wolf. “Wolf law” is unique, odd, and often counterproductive—at least if the goal is to ensure the species’ survival and revitalize damaged ecosystems upon which healthy human communities depend. This Article identifies some of the unique characteristics of wolf law, analyzes how and why it has developed in this strange way, and proposes some more sensible ways for healthy human communities to coexist with healthy wolf communities.

We analyze how politics and human needs—rather than the needs of the wolves—have driven the U.S. Fish & Wildlife Service’s approach to wolf management, often to the detriment of the species it is legally obliged to protect. After reviewing the fundamentals of the Endangered Species Act, we trace the history of Northern Rocky Mountain gray wolves and highlight the unique, controversial, and often unhelpful (at least if we wish to ensure the species’ survival) ways the USFWS has managed the species. We illustrate the tensions between the clear statutory mandates of the ESA and the political pressures shaping wolf conservation around human wants. We outline some of the themes that set “wolf law” apart from the pack. Finally, we suggest a path forward to manage wolves in a sensible manner that better fulfills the needs of the species—and thus, inevitably, the needs of our own species—as the ESA requires.

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The wolf is known by many names Hó'nehe. Shóntonga. Cheétxiilisee. Šuygmánitu thájka. Ómahkapi'si. Mélems't ye. Makoyi. Bia isa. Hooxei. Ruv. Tha:yö:nih. Okwaho. Othahyu-ní. Ma'iingan. Skiri. Nci'cn. Kwewu. Wahya. Himiin. Shin-ab. Tséena. The wolf (Canis lupus) is known by many names and for time immemorial has held an esteemed place in the cultures and lifeways of the original inhabitants of this continent. The wolf has guided and influenced indigenous people in a foundational way, literally since the beginning of time. The wolf brought knowledge and understanding of Mother Earth that is mirrored in the stars. The wolf has influenced indigenous societal structures through the pack, imparting the communal responsibility to sustain life. The wolf taught many to survive by the hunt and to live in a spiritual compact of reciprocity. The wolf provided guidance for environmental stewardship and ecological balance. The wolf is a teacher, a guardian, a clan guide—a relative.¹

1. *The Wolf: A Treaty of Cultural and Environmental Survival*, GLOBAL INDIGENOUS COUNCIL (Oct. 2019), https://www.globalindigenouscouncil.com/_files/ugd/13fe3b_4b6903b1915d4ab5a1970eaf40974aba.pdf [<https://perma.cc/X6LM-ZH7K>].

INTRODUCTION

Wolves have long inspired both intense violence and profound compassion. For decades in the United States, gray wolves have been managed, in one way or another, under our most ambitious species conservation law—the Endangered Species Act of 1973 (ESA). Since it was first listed as endangered, a species that was brought to the precipice of extinction has been restored in many parts of its historic range: the gray wolf’s recovery is an endangered species success story. Nevertheless, the story of the gray wolf is much more convoluted than that of any other species that has gained protection under the ESA, its management a baroque anomaly. As the United States District Court, District of Columbia noted: “The gray wolf, like the bald eagle and the grizzly bear, has become a symbol of endangered species but, perhaps more than other such species, the gray wolf is also a lightning rod for controversy.”² That controversy shows no signs of abating.

As the ecosystems that support human life on Earth continue to degrade and unravel, human communities face daunting reckonings. Humanity is fundamentally dependent on the services that functioning ecosystems provide.³ And ecosystems need predators to function. Not only are wolves a keystone species within their ecosystem, but they also provide significant benefits to humans in the form of increasing carbon sequestration in ecosystems and other economic benefits.⁴ With an exponentially growing human population, we must find ways to sustain and restore the predators essential for ecosystems that support human well-being. Wolf management as implemented in the U.S. presents lessons for how *not* to promote the health of human and nonhuman communities. But if the United States can get wolf law right, if we can figure out how to manage our most iconic and most reviled, imperiled species, we can apply those lessons nationally and globally to equally imperiled species and ecosystems.

Regional subspecies of the gray wolf (*Canis lupis*) were among the first species listed as endangered species under the 1973 ESA and its predecessor conservation statutes.⁵ In fact, the Northern Rocky Mountain wolf, a regional subspecies of the gray wolf, was originally listed as an endangered species under the Endangered Species Conservation Act of 1969.⁶ While the

2. Humane Soc’y of the U.S. v. Jewell, 76 F. Supp. 3d 69, 74 (D.D.C. 2014); Endangered Species, 32 Fed. Reg. 4001, 4001 (March 11, 1967).

3. Costanza et al. estimate the total economic value of ecosystem services at U.S. \$125–\$145 trillion, and estimate that, between 1997 and 2001, we lost U.S. \$4.3–\$20.2 trillion per year due to land degradation. Robert Costanza et al., *Changes in the Global Value of Ecosystem Services*, 26 GLOB. ENV’T CHANGE 152, 152 (2014).

4. *Infra*, Part IV.

5. 38 Fed. Reg. 14,678, 14,678 (June 4, 1973); 32 Fed. Reg. 4,001, 4,001 (March 11, 1967). Specifically, the Endangered Species Preservation Act of 1966 (Pub. L. No. 89–669, 80 Stat. 926 (1966)) and the Endangered Species Conservation Act of 1969 (Pub. L. No. 91–135, 83 Stat. 275 (1969)).

6. Amendments to Lists of Endangered Fish and Wildlife, 38 Fed. Reg. 14678, 14678

nomenclature surrounding wolf populations has changed over time, this Article focuses on the gray wolf populations that are part of what has become known as the Northern Rocky Mountain population. This includes wolves in Montana, Idaho, Oregon, Washington, and Wyoming.

The United States Fish and Wildlife Service's (the "Service") approach to implementing the ESA has not been static, but rather has evolved over time.⁷ Previous scholars have analyzed specific moments and periods in the story of the gray wolf. In this Article, we draw on this existing body of literature to show how what has emerged as "wolf law" is unique, odd, and often counter-productive—at least if the goal is to ensure the species' survival and revitalize damaged ecosystems upon which healthy human communities depend. The controversies surrounding gray wolves have led to bizarre and, in some cases, illegal techniques for managing the species. In managing gray wolves, the Service has not only explored new interpretations of the ESA's requirements, but has developed and applied a unique, and not always successful or helpful approach, to conservation and recovery. This Article identifies some of the unique characteristics of wolf law, analyzes how and why it has developed in this strange way, and proposes some more sensible ways for healthy human communities to coexist with healthy wolf communities.

First, politics, as much as biology, has driven wolf conservation. Under the ESA, the Service has managed gray wolves in ways that are politically expedient, but conflict with biological realities. The countless legal battles fought over the gray wolf illustrate the various ways in which the Service has pushed against the boundaries of the ESA's mandates to rely on scientific data rather than politics. The gray wolf is certainly not alone in this regard—few agency decisions are truly free from political influence. However, the extent to which politics has driven the development of wolf law is an outlier among endangered and threatened species.

Second, the Service has developed "socially sound" recovery methods that focus on potential impacts on humans, as opposed to impacts on species survival. By focusing on human animosity towards wolves, the Service has shaped much of the wolf's recovery around reducing these tensions. Consequently, the system that emerged permits killing large numbers of wolves, contradicting the mandates of the ESA.

Third, unlike many other environmental laws that emerged from the 1970s, the ESA does not usually rely on cooperation between state and federal agencies—cooperative federalism.⁸ For most species, the ESA operates at the

(June 4, 1973).

7. See generally Dale D. Goble, *Recovery in a Cynical Time—with Apologies to Eric Arthur Blair*, 82 WASH. L. REV. 581 (2007) (detailing changes in the Service's approach to implementing the ESA).

8. See generally Kaush Arha & Barton H. Thompson, Jr., *Federalism Under the Endangered Species Act*, in *THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT* (Kaush Arha & Barton H. Thompson,

federal level with states playing a subordinate role, if any role at all. This has not been the case for the gray wolf. What has emerged from decades of legal battles, agency rules, state management, and congressional intervention is a sort of four-legged cooperative federalism—between states, federal agencies, Congress, and courts—yielding unusual and adversarial results.

Finally, the Service manipulates wolf populations in a mechanical manner—moving individual wolves around like chess-pieces on the landscape, transplanting populations hither and yon, and allowing widespread slaughter of individuals or packs that become politically inexpedient. In this Article, we provide a timeline of the Service’s byzantine machinations and analyze how and why federal and state governments, driven by countervailing political forces, have pursued such unorthodox maneuvers.

Part I of this Article reviews the fundamental aspects of the ESA— in our view the most radical environmental law ever passed in the U.S.—mandating the treatment of non-human species as valuable in their own right, and requiring their protection from extinction, no matter the human cost. In Part II, we trace the history of Northern Rocky Mountain gray wolves and highlight their uniqueness among endangered species. This story illustrates the tensions between the clear statutory mandates of the ESA and the political pressures shaping species conservation around human wants. In Part III, we outline some of the themes that set “wolf law” apart from the pack. Finally, in Part IV, we suggest a path forward to manage wolves in a sensible manner that better fulfills the needs of the species—and thus, inevitably, the needs of our own species—as the ESA requires.

I. BACKGROUND OF THE ENDANGERED SPECIES ACT

Congress enacted the ESA in 1973 to conserve the planet’s plant and animal species in response to the growing threat of mass extinction.⁹ In doing so, Congress declared the importance of preserving species and “provide[d] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered and threatened species,”¹⁰ “whatever the cost.”¹¹ The United States Supreme Court has since recognized the ESA as the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹²

For such an ambitious and far-reaching statute, the ESA is relatively concise and straightforward—on paper, at least. The core ESA programs are set out to support the goal of preserving species and creating a mechanism for

Jr. eds., 2011).

9. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973).

10. *Id.* § 1531(b).

11. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 154 (1978).

12. *Id.* at 180.

preserving and recovering species facing extinction. The ESA prescribes two separate levels of protections for endangered and threatened species. “Endangered species” are “any species which is in danger of extinction throughout all or a significant portion of its range...” and “threatened species” are “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”¹³

Under the ESA, conserving a species means “to use . . . all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided . . . are no longer necessary.”¹⁴ As we discuss below, the ESA is frequently implemented in a manner that hopes such measures would be no longer necessary—because there would be no more wolves.

A. *Listing*

The ESA provides protections for species that the Service determines to be threatened or endangered. First, the Secretary of the Department of the Interior (the “Secretary”) determines whether an animal, plant, fish, or insect belongs on the list of endangered or threatened species.¹⁵ When making this determination, the Secretary promulgates regulations.¹⁶ Species are defined to “include any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”¹⁷ Accordingly, a species may be a full, taxonomic species, or “subspecies,” but also a “distinct population segment.”¹⁸

Added as part of the 1978 amendments,¹⁹ distinct population segments (DPS) have been central to wolf recovery efforts under the ESA. For nearly twenty years, the phrase “distinct population segment” was not defined in the ESA, nor was it “commonly used in scientific discourse.”²⁰ It was not until 1996 that the Service promulgated its policy to guide the identification of DPS.²¹ In this policy, the Service outlined three elements required of a DPS: “[d]iscreteness of the population segment[,]” the “[s]ignificance of the population segment[,]” and the “population segment’s conservation status.”²²

13. 16 U.S.C. § 1532.

14. *Id.* § 1532(3).

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

16. 16 U.S.C. § 1533(a)(1).

17. *Id.* § 1532(16).

18. The 1973 Act did not include the concept of a distinct population segment, which was added as part of the 1978 amendments. *See Jewell*, 76 F. Supp. 3d at 77-79.

19. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(5), 92 Stat. 3751, 3752 (1978).

20. *Jewell*, 76 F. Supp. 3d at 79.

21. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996) [hereinafter DPS Policy].

22. *Id.* at 4725.

When evaluating whether to add a species to the list of threatened or endangered species, the Service evaluates five factors: (1) destruction, modification, or curtailment of habitat or range; (2) overutilization; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting the species' existence.²³ While some species may qualify for listing based on multiple factors, the Service may make its determination based on just one.²⁴

The Service may list a species by initiating the process itself or, as is more often the case, members of the public may petition the Service to list a species.²⁵ The Service reviews species for listing based on the best available scientific and commercial data and also considers state conservation efforts.²⁶

B. *Delisting*

Despite the fact that the ESA should be trying to restore species back to health, rather than keep them on life support indefinitely, delisting is not specifically contemplated in the ESA.²⁷ In fact, the ESA does not contain explicit provisions for delisting or reclassifying a species.²⁸ Through multiple rounds of amendments, Congress has clarified that the procedure for delisting is simply the reverse of that for listing.²⁹ Accordingly, the Service considers the same criteria as it does for listing to determine whether a species no longer qualifies as endangered or threatened.³⁰ The Service may also commission a recovery plan to provide guidance for a species' conservation. While meeting the goals set out in a recovery plan may indicate a species' recovery, it does not guarantee that it will be delisted.³¹ As of this writing, 54 species have been delisted because they have recovered, 56 species have had their status changed from "endangered" to "threatened," and the Service is now contemplating delisting another 23 species due to probable extinction.³²

23. 16 U.S.C. §§ 1533(a)(1)(A)–(E).

24. *Id.* § 1533(a)(1) ("The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of *any* of the following factors.") (emphasis added).

25. *See* 16 U.S.C. § 1533(b).

26. *Id.* § 1533(b)(1)(A); *see also* Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15100, 15114 (Mar. 28, 2003) (evaluation of conservation agreements in making listing decision).

27. Martha Williams, *Lessons from the Wolf Wars: Recovery v. Delisting Under the Endangered Species Act*, 27 *FORDHAM ENV'T. L. REV.* 106, 124 (2015).

28. *Id.*

29. *Id.* at 124-25.

30. *Id.* at 125.

31. *Id.*

32. Press Release, U.S. Dep't of the Interior, U.S. Fish and Wildlife Service Proposes Delisting 23 Species from Endangered Species Act Due to Extinction (Sept. 29, 2021), <https://www.doi.gov/pressreleases/us-fish-and-wildlife-service-proposes-delisting-23-species-endangered-species-act-due> [<https://perma.cc/W6E9-WYY3>].

C. *Prohibitions*

Once a species is listed, it is protected by numerous requirements and prohibitions under the ESA. Section 7—the “consultation” requirement—requires federal agencies to consult with the Secretary for any agency action that could “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.”³³ Additionally, Section 9 prohibits “takes” of listed species.³⁴ According to Section 9, to “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”³⁵ Section 4(d) is central to the flexibility afforded to the Secretary in administering the ESA. While the Section 9 take prohibition applies to all endangered species, Section 4(d) allows the Service, at the Secretary’s discretion, to decline to apply all or part of Section 9 to threatened species.³⁶

D. *Recovery*

The ESA allows the Service to use a variety of methods to “recover” a species to the point at which the species is capable of surviving in the wild without the ESA’s protections. These tools can include: (1) acquiring and restoring habitat; (2) removing invasive species; (3) monitoring populations; (4) and breeding and releasing species into their historical range.³⁷ Frequently, the process of recovery involves removing or reducing threats to an endangered or threatened species.³⁸ Section 4 of the ESA requires the Service to “develop and implement plans,” commonly referred to as recovery plans, “for the conservation and survival of endangered species and threatened species.”³⁹ Recovery plans are the weakest link of the ESA, because the Act requires no timeline for their preparation, and contains no mandate that the Service (or anyone else) actually do what a given plan suggests.⁴⁰

33. 16 U.S.C. § 1536(a).

34. *Id.* § 1532(19).

35. *Id.*

36. *Id.* § 1533(d). “Whenever any species is listed as a threatened species pursuant to subsection (c) of this Section, the Secretary shall issue such regulations as [she] deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under Section 1538(a)(1) of this title, in the case of fish or wildlife, . . . with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to Section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.” *Id.*

37. Williams, *supra* note 27, at 125.

38. *Id.* at 126; Endangered Species Recovery Program, U.S. FISH & WILDLIFE SERV. (June 2011), <https://www.fws.gov/media/endangered-species-recovery-program>.

39. 16 U.S.C. § 1533(f)(1).

40. See, e.g., *Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 417-18 (9th Cir. 2023) (collecting cases).

Recovery plans are typically written by biologists along with species experts, state and federal agencies, Tribes, and other stakeholders.⁴¹ Additionally, the Service may partner and cooperate with states that have sufficient regulatory protections to form cooperative agreements.⁴²

Of particular importance for this Article, Congress added Section 10(j) as part of the 1982 ESA amendments.⁴³ In an effort to improve recovery efforts and to reintroduce species throughout their historical range, Section 10(j) allows the Secretary to release “experimental populations” outside of the species’ current range.⁴⁴ An experimental population is “wholly separate geographically from nonexperimental populations of the same species,”⁴⁵ and its release is allowed “if The Secretary determines that such a release will further the conservation of such species.”⁴⁶ These populations may be treated as threatened, even where the species is listed as endangered, affording the Secretary increased management flexibility.

Wolf management has emerged largely from these sections of the ESA.

II. HISTORY OF GRAY WOLVES IN THE NORTHERN ROCKY MOUNTAINS

Over 1,600 domestic species have gained the ESA’s protections. However, no other listed species has faced the same convoluted and misguided journey under the ESA as the gray wolf.

Wolves were once abundant throughout North America.⁴⁷ However, as settlers began moving across the United States, domestic livestock replaced native ungulates, a primary food source for wolves.⁴⁸ As wolves increasingly preyed on livestock, local and federal governments set out to exterminate wolves across the country.⁴⁹ Bounties provided by government agencies encouraged wolf hunters to poison, trap, and kill wolves in droves.⁵⁰ By the

41. Williams, *supra* note 27, at 127; 16 U.S.C. § 1533(f)(2).

42. 16 U.S.C. § 1535(c).

43. Endangered Species Act Amendments of 1982, Pub. L. No. 97–304, § 2, 96 Stat. 1411, 1424 (1982) [hereinafter 1982 Amendments].

44. 16 U.S.C. § 1539(j).

45. *Id.*; 1982 Amendments, *supra* note 43, at 1424.

46. 1982 Amendments, *supra* note 43, at 1424; 16 U.S.C. § 1539(j).

47. Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population’s Status as an Experimental Population, 77 Fed. Reg. 55530, 55535 (Sept. 10, 2012) (codified at 50 C.F.R. pt. 17) [hereinafter 2012 Rule]. By some estimates, North America had between 250,000 and two million gray wolves at one point. Hillary Richard, *Wolves Returned to California. So Did ‘Crazy’ Rumors*, N.Y. TIMES, Mar. 15, 2022 (§ D), at 8.

48. U.S. FISH & WILDLIFE SERV., NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN 1 (1987) [hereinafter 1987 RECOVERY PLAN].

49. *Id.* In Idaho, for example, the Department of Fish and Game “was authorized by State Legislation to ‘devise and put into operation such methods and means, as would best serve to attain extermination of wolves, coyotes, wildcats, and cougars.’” *Id.* at 3 (citations omitted).

50. *Id.* at 1; 2012 Rule, *supra* note 47, at 55535.

mid-twentieth century, gray wolves were completely eliminated from Wyoming, Montana, and Idaho and were functionally extinct throughout the rest of the continental U.S.⁵¹ Wolves were on the precipice of total extinction in the continental United States when wolf conservation and management began at the federal level under the Endangered Species Act (ESA) and its predecessors.

A. *An Era of Federal Protection*

The first push to conserve wolves began just before, and culminated shortly after, Congress enacted the ESA of 1973. The timber wolf (*Canis lupus lycaon*), a subspecies of the gray wolf, was originally listed under the first species conservation legislation, the Endangered Species Preservation Act of 1966.⁵² Then, in 1969, Congress passed the Endangered Species Conservation Act of 1969, strengthening protections for endangered species.⁵³ Early in 1973, the Northern Rocky Mountain wolf joined the timber wolf on the list of endangered species under the 1969 Act.⁵⁴ Shortly thereafter, Congress enacted the Endangered Species Act of 1973, a much stronger statute that enhanced endangered species protections.⁵⁵ Both the timber wolf and Northern Rocky Mountain wolf subspecies remained listed as endangered under the amended ESA, but gray wolves (*Canis lupus*), as a species, were not protected.⁵⁶ In 1976, the Service added the Mexican wolf subspecies (*Canis lupus baileyi*) to the list of endangered species, continuing the fragmented protection of gray wolves.⁵⁷ Later that year, the Texas wolf (*Canis lupus monstrabilis*) joined the list as a fourth gray wolf subspecies protected under the 1973 ESA.⁵⁸

As gray wolves gained protection, some states pushed back. In 1977, the Service began revising the gray wolf's listing.⁵⁹ Leading up to a review of the gray wolf's protections in 1978, the Commissioner of the Minnesota Department of Natural Resources petitioned the Service to exclude Minnesota from

51. 2012 Rule, *supra* note 47, at 55535; Williams, *supra* note 27, at 132.

52. *Humane Soc'y of the U.S. v. Jewell*, 76 F.Supp.3d 69, 81 (D.D.C. 2014); Endangered Species, 32 Fed. Reg. 4001, 4001 (March 11, 1967).

53. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969).

54. Amendments to Lists of Endangered Fish and Wildlife, 38 Fed. Reg. 14678, 14678 (June 4, 1973).

55. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1973).

56. Endangered Native Wildlife, 39 Fed. Reg. 1175, 1175 (Jan. 4, 1974) (codified at 50 C.F.R. § 1711).

57. Determination That Two Species of Butterflies Are Threatened Species and Two Species of Mammals Are Endangered Species, 41 Fed. Reg. 17736, 17740 (April 28, 1976) (codified at 50 C.F.R. pt. 17).

58. Endangered Status for 159 Taxa of Animals, 41 Fed. Reg. 24062, 24066 (June 14, 1976) (codified at 50 C.F.R. pt. 17).

59. Proposed Reclassification of the Gray Wolf in the United States and Mexico, With Proposed Critical Habitat in Michigan and Minnesota, 42 Fed. Reg. 29527, 29528 (June 9, 1977) (codified at 50 C.F.R. pt. 17).

the range in which the timber wolf was afforded protections, marking the first of many speed bumps for gray wolves' protection under the ESA.⁶⁰

As part of this review, the Service shifted its approach to wolf conservation away from managing gray wolves by individual subspecies and towards classifying them as a single species. Until that point, wolves had been listed by subspecies, each with a geographically defined range.⁶¹ Presumably because wolves did not recognize the Service's maps or taxonomic classifications, this approach had become, as one court expressed it, "unsatisfactory because the taxonomy of wolves [was] out of date, wolves may wander outside of recognized subspecific boundaries, and some wolves from unlisted subspecies may occur in certain parts of the lower 48 states."⁶² Moreover, gray wolves as a species, *Canis lupus*, "formerly occurred in most of the conterminous United States and Mexico," but because "of widespread habitat destruction and human persecution, the species now occupie[d] only a small part of its original range in these regions."⁶³

Thus, in 1978, the Service divided gray wolves into two species in the lower 48 states.⁶⁴ The first group included all gray wolves in the state of Minnesota.⁶⁵ The second species consisted of all other gray wolves in the 48 conterminous states, excluding those in Minnesota.⁶⁶ In response to the pressure from Minnesota state officials, the Minnesota wolf population was listed as threatened, and accordingly only granted some of the ESA's protections.⁶⁷ The Service's 4(d) rule for the Minnesota population allowed for lawful killing of wolves in self-defense or of those "committing significant depredation on lawfully present domestic animals."⁶⁸ These special rules for Minnesota wolves

60. Eastern Timber Wolf in Minnesota, Review of Status, 39 Fed. Reg. 40877, 40877 (Nov. 21, 1974).

61. Final Rule to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15804, 15806 (Apr. 1, 2003) [hereinafter 2003 Rule].

62. Humane Soc'y of the U.S. v. Jewell, 76 F. Supp. 3d 69, 82 (D.D.C. 2014), *aff'd sub nom.*, 865 F.3d 585 (D.C. Cir. 2017) (quoting Proposed Reclassification of the Gray Wolf in the United States and Mexico, With Proposed Critical Habitat in Michigan and Minnesota, 42 Fed. Reg. 29527, 29527 (June 9, 1977) (codified at 50 C.F.R. pt. 17)).

63. *Id.*

64. At the time, the ESA definition of "species" did not include the concept of "distinct population segments." See Humane Soc'y v. Jewell, 76 F. Supp. 3d at 84.

65. Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607, 9612, 9615 (Mar. 9, 1978) (codified at 50 C.F.R. pt. 17) [hereinafter 1978 Rule].

66. *Id.* at 9610.

67. *Id.* at 9608.

68. *Id.* at 9615. Prior to this rule, the wolf population in Minnesota was listed as endangered under the timber wolf listing. *Id.* at 9608. Leading up to the 1978 Rule, the Minnesota Department of Natural Resources objected to the wolf's endangered classification. *Id.* Presumably, the Service saw the 1978 Rule, listing Minnesota wolves as merely threatened, as a compromise that would appease the state's concerns. That proved to

were “deemed necessary and advisable to provide for the future wellbeing of the species” and “[were] intended to ameliorate present conflict between the wolf and human interests.”⁶⁹ The second population was listed as endangered and granted full protection of the ESA.⁷⁰ And so, the trend of shaping wolf conservation to meet human desires began.

Next, the Service appointed a recovery team to develop a plan for the Northern Rocky Mountain wolf.⁷¹ In 1980, the Service, along with the recovery team, approved the first Northern Rocky Mountain wolf recovery plan (the “Recovery Plan”),⁷² with the stated goal of helping transition the Northern Rocky Mountain wolf from endangered to threatened.⁷³ This included identifying the historical range of the wolves, resolving conflicts between recovery of wolves and human interests,⁷⁴ and identifying measures to re-establish wolf populations where “ecologically and socially sound.”⁷⁵

The Recovery Plan represented another early effort by the Service to shape gray wolf recovery around human desires and preferences, rather than vice versa, as the ESA requires. In the Recovery Plan, the recovery team noted that conflicts between livestock and wolves were one of the main reasons behind the species’ decline.⁷⁶ Furthermore, the Recovery Plan described the role that the federal and local governments had played in the decline of the wolves in the first place.⁷⁷ As livestock became more prevalent in the wolves’ habitat, the wolves increasingly preyed on them, “coming in direct conflict with man.”⁷⁸ Consequently, “[t]hese wolves, by becoming accustomed to domestic stock as their prey, created fear and hatred against all wolves,”⁷⁹ which led local governments, ranchers, and the federal government to hire professional trappers and offer large bounties for the capture of wolves.⁸⁰ Although the

not be the case, however, as the Governor of Minnesota “stated that the wolf in Minnesota should be classified neither as Endangered nor Threatened.” *Id.*

69. *Id.* at 9607.

70. *Id.* at 9612.

71. Timothy B. Strauch, *Holding the Wolf by the Ears: The Conservation of the Northern Rocky Mountain Wolf*, 27 LAND & WATER L. REV. 33, 51-52 (1992).

72. U.S. FISH & WILDLIFE SERV., NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1980), <https://ia803002.us.archive.org/12/items/northernrockymou1980nort/northernrockymou1980nort.pdf> [<https://perma.cc/ET2U-9BMF>] [hereinafter 1980 RECOVERY PLAN]; 1987 RECOVERY PLAN, *supra* note 48, at 111.

73. 1980 RECOVERY PLAN, *supra* note 72, at 11.

74. The plan notes that “[o]n Federal lands recovery objectives may be offered varying degrees of encouragement; from total in national parks to partial on Forest Service and Bureau of Land Management grazing allotments. On private land and on state grazing leases recovery objectives would in many cases be granted little or no encouragement.” *Id.* at 14.

75. *Id.* at 21.

76. *Id.* at 1-2.

77. *Id.* at 2.

78. *Id.*

79. *Id.*

80. *Id.*

Recovery Plan did not define “socially sound” locations for reintroduction, it is clear that minimizing the impacts of wolves on humans was central to its analysis.⁸¹

Additionally, the Recovery Plan laid the foundation for incorporating cooperative federalism into wolf management—a departure from typical species management under the ESA.⁸² The Recovery Plan emphasized the central role of states in recovery: “[s]ince the Act clearly provides an avenue for state leadership in endangered species recovery, we have retained state responsibility for a majority of plan items.”⁸³ States’ roles included management, research, and implementation of various parts of the Recovery Plan.⁸⁴ More specifically, states were tasked as the lead agencies in minimizing mortality, educating the public, enforcing the ESA, holding public hearings, selecting release sites, and tagging and tracking transplanted wolves.⁸⁵

This early embrace of cooperative federalism highlighted the tension between state goals (especially those states that did not favor wolves) and federal conservation objectives under the ESA. Proponents of state management emphasized the expertise of local governments and their ability to sooth adversarial attitudes towards wolves.⁸⁶ This stands in stark contrast to the fact that, at the time the Recovery Plan was released, two of the states in the Northern Rocky Mountain Wolf range still operated bounty programs for gray wolves.⁸⁷ More importantly, “[a]s with many, many [sic] other federal laws, the Endangered Species Act was designed, in part, to ensure the achievement of *national* objectives even over the opposition of local and state authorities.”⁸⁸ In its review of the Recovery Plan, the Oregon Wolf Study Group noted its concerns:

81. *Id.* at 21. The Recovery Plan recommends, as part of these efforts, to “[d]etermine where re-establishment would have minimal impact on human activity.” *Id.* The Recovery Plan also suggests that “[i]ntroduction will only follow an appropriate study which clearly indicates successful re-establishment with minimal conflict with existing land uses.” *Id.* at 22.

82. Unlike other major environmental statutes of the 1970s, the ESA does not rely on a cooperative federalism model. See J.B. Ruhl, *Cooperative Federalism and the Endangered Species Act: A Comparative Assessment and Call for Change*, in *THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT* (Kaush Arha & Barton H. Thompson, Jr. eds., 2011); see also Robert L. Fischman et al., *Collaborative Governance Under the Endangered Species Act: An Empirical Analysis of Protective Regulations*, 38 *YALE J. REG.* 976 (2021) (analysis of collaborative governance under the ESA); but see John Nagle, *The Original Role of the States in the Endangered Species Act*, 53 *IDAHO L. REV.* 385 (2018) (arguing that the ESA was intended to be implemented through cooperative federalism).

83. 1980 RECOVERY PLAN, *supra* note 72, at iii.

84. See *id.* at 26-31.

85. *Id.*

86. See, e.g., Fischman et al., *supra* note 82, at 976-77 (2021) (arguing that collaborative governance can encourage less stringent federal regulations and, paradoxically, promote enhanced species recovery).

87. 1980 RECOVERY PLAN, *supra* note 72, at 60.

88. *Id.* (emphasis in original).

What it really comes down to, however, is that “states’ rights,” the traditional wildlife management role of the states, are legally superseded by national responsibility in cases involving endangered species. The members of the Recovery Team understandably wish to finesse [sic] this controversial new arrangement, but their recommended task assignments will protect “states’ rights” to wolf management by almost ensuring that there will be no wolves left to manage.⁸⁹

The damning critique continues:

The conclusion of this analysis is clear: there is an unmistakable mandate for federal action to implement a Recovery Plan that would otherwise languish under state inaction or biased performance. Again, it bears repeating: the objectively predictable outcome of allowing state assumption of major recovery tasks will be the partial if not complete failure of the plan to accomplish its objective.⁹⁰

These concerns foreshadowed the tension between federal and local management that continued after further Congressional action and continues to this day.⁹¹

1. Responding to Citizen Fears, Congress Revisits the ESA

In 1982, two years after the first Recovery Plan was published, Congress amended the ESA.⁹² Up until this point, the Service frequently faced strong opposition to its efforts to reintroduce endangered species into their historical ranges because landowners feared the obligations that came with hosting such species on their land.⁹³ In an effort to alleviate this tension, as part of the 1982 amendments to the ESA, Congress added the 10(j) rule, which allows for reintroduced populations of endangered and threatened species—and their offspring—to be designated as “experimental.”⁹⁴ Under Section 10(j), “experimental populations” are treated as threatened species and managed

89. *Id.* at 59.

90. *Id.* at 62.

91. See GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, THOMSON REUTERS, 3 PUBLIC NATURAL RESOURCES LAW § 29:17 (2d ed. 2022) for a discussion of whether recovery plans are binding.

92. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 2, 96 Stat. 1411, 1411 (Oct. 13, 1982).

93. S. REP. NO. 97-418, at 32 (1982) (“Federal agencies have voiced similar concerns and are often reluctant to give approval for reintroduction for fear of delay, alterations, or postponements of ongoing or proposed actions through application of Section 7. TVA, for instance, has expressed concern about efforts to reintroduce the red wolf into the Land between the Lakes area in Tennessee without assurance that flexibility will be provided for the management of the species.”).

94. *Id.* (“[The 10(j) rule] would help to address this very difficult situation by creating a new category of ‘experimental population.’ By authorizing the Secretary to issue special regulations for these species, the bill would provide the flexibility to fashion an administrative remedy to the problems raised.”); H.R. 6133, 97th Cong. § 6(6) (1981) (enacted).

with increased flexibility—stripping them of many of the protections offered to endangered species.⁹⁵

Treating experimental populations as threatened means that the Secretary is not obligated to provide them with specific protections.⁹⁶ For endangered species, Section 9 provides strong protection by prohibiting a range of activities—or “takes”—that would harm an endangered species.⁹⁷ While Section 9 authorizes the Secretary to promulgate regulations that would protect a threatened species through Section 4(d), neither Section requires that the Secretary do so.⁹⁸ Because these protections do not necessarily extend to threatened species, the 10(j) rule effectively relaxed the Section 9 take prohibitions for reintroduced experimental populations.

The Service is required to make two findings before reintroducing a species under Section 10(j). First, an experimental population must be “wholly separate geographically from nonexperimental populations of the same species.”⁹⁹ Second, the Service must determine “whether or not such population is essential to the continued existence of an endangered species or a threatened species.”¹⁰⁰ If the population is found to be nonessential, it is treated as a “species proposed to be listed” for the purposes of Section 7 and is not subject to the protection of the Section 7 jeopardy prohibition and consultation requirements.¹⁰¹ Furthermore, Section 10(j) explicitly prohibits any critical habitat designation for non-essential experimental populations.¹⁰² Taken together, by adding Section 10(j), Congress significantly increased the management flexibility—and decreased protections—for gray wolves.¹⁰³

In fact, the 10(j) rule was likely added with wolves specifically in mind. As the Senate Report to the 1982 ESA amendments indicates:

Where appropriate, the regulations may allow for the direct taking of experimental populations. *For example, regulations pertaining to the release of experimental populations of predators, such as red wolves, will probably allow for the taking of these animals if deprivations [sic] occur or*

95. 1982 Amendments, *supra* note 43, at 1424.

96. Frederico Cheever, *From Population Segregation to Species Zoning: The Evolution of Reintroduction Law Under Section 10(j) of the Endangered Species Act*, 1 Wyo. L. REV. 287, 303 (2001).

97. 16 U.S.C. § 1538(a)(1).

98. *Id.* § 1538(a)(1)(G), (a)(2)(E).

99. *Id.* § 1539(j)(1).

100. *Id.* § 1539(j)(2)(B). This distinction carries little meaning in practice, however, as neither the Service nor National Marine Fisheries Service have ever listed an “essential” experimental population. HUNTER SAPIENZA & YA-WEI LI, ENV’T POL’Y INNOVATION CTR. 8 *Reintroduction: An Assessment of Endangered Species Act Experimental Populations*, (2021), <https://static1.squarespace.com/static/611cc20b78b5f677dad664ab/t/614a4d4580a2092053732795/1632259399497/EPIC-Experimental-Population-Analysis.pdf> [<https://perma.cc/26NN-W6F8>].

101. 1982 Amendments, *supra* note 43, at 1424.

102. *Id.* at 1425.

103. The 1982 amendments also increased the maximum Federal share of grants to states, possibly signaling the emphasis on state management. *Id.* at 1416.

if the release of these populations will continue to be frustrated by public opposition.¹⁰⁴

While it is not clear that concern about wolf management drove Congress to add the 10(j) rule, it is likely that wolves were one of the species for which this rule was meant to apply.¹⁰⁵

The “wholly separate geographically” requirement for experimental populations has proven to be a driving factor in wolf recovery efforts. In fact, it poses a barrier to recovery because, as Professor Fred Cheever noted, it “can create a perceived need to prevent ‘overlap’ of experimental and non-experimental populations. This need to prevent overlap can frustrate recovery by encouraging wildlife managers to actively isolate experimental and naturally occurring populations.”¹⁰⁶ Furthermore, while the text of the ESA is not clear, if an experimental population comingles with an endangered population of the same species, both populations may gain full protection under the ESA.¹⁰⁷ In many ways, this language shaped the Service’s notion of “population,” adopted twelve years later with regard to gray wolves.¹⁰⁸ While it would be convenient for wildlife managers if species remained in place after reintroduction, it turns out many wolves do not recognize the boundaries drawn by their human counterparts at the Service, and thus the “experiment” goes awry.¹⁰⁹

Further complicating matters, throughout much of the United States, gray wolves no longer have any natural population, i.e. one not the result of reintroduction efforts by humans.¹¹⁰ Nevertheless, most experts believe that maintaining a “metapopulation”—separate populations that are connected and able to interact and interbreed—provides a more secure pathway to full

104. S. REP. NO. 97-418, at 8 (1982) (emphasis added).

105. *Id.* at 32 (1982) (discussing how experimental populations could be used to help recover the red wolf which, at the time, only existed in captivity in some states); *see also* H.R. Rep. No. 97-567, pt. 1, at 34 (1982) (“For example, the release of experimental populations of predators, such as red wolves, could allow for the taking of these animals if depredations occur or if the release of these populations will continue to be frustrated by public opposition.”).

106. Cheever, *supra* note 96, at 291.

107. *Id.* at 340.

108. *Id.* at 293. Cheever suggests that this was a “mistake” due to a “flawed perception” of a “static notion of biology.” *Id.* at 294. Alternatively, it may have been nothing more than a stopgap measure aimed at appeasing various constituencies and to leave it to future decision-makers to figure out what to do when wolves decided to walk other places.

109. Moreover, this fails to acknowledge that limited genetic variability is a primary concern for many endangered species. Thus, requiring that populations remain separate makes little biological sense, because it would limit genetic variability by preventing introduced individuals from breeding with “native” wolves and forming new packs. *See, e.g.,* Dr. Charles Carroll, *Peer Review of USFWS’s Draft Biological Report and Proposed Delisting Rule, in ATKINS, SUMMARY REPORT OF INDEPENDENT PEER REVIEWS FOR THE U.S. FISH AND WILDLIFE SERVICE GRAY WOLF DELISTING REVIEW 125-26 (2019)* [hereinafter *ATKINS SUMMARY*].

110. Williams, *supra* note 27, at 132. Even if there were individuals remaining, through its definition of “population,” the Service declared that they would not count as a population. *See infra* p. 25.

recovery for wolves.¹¹¹ While promoting genetic variability among reintroduced populations clearly benefits recovery efforts, it is unclear what legal implications it has. At what point does an experimental population lose its experimental status? Do all gray wolves descended from experimental populations remain experimental? The ESA provides little guidance in this respect, and it is unclear how, or when, species that were deemed experimental populations would ever escape this categorization.¹¹²

2. Reintroducing Wolves to Their Former Redoubts

In 1987, the Service revisited the Northern Rocky Mountain Wolf Recovery Plan and outlined steps for the species' recovery.¹¹³ This plan (the "1987 Recovery Plan") expanded on the previous Recovery Plan and aimed "to remove the Northern Rocky Mountain wolf from the endangered and threatened species list by securing and maintaining a minimum of ten breeding pairs in each of the three recovery areas for a minimum of three successive years."¹¹⁴ The Service planned to meet these recovery goals by reintroducing gray wolves into Yellowstone National Park.¹¹⁵ In doing so, the Service set specific, numeric recovery goals for the wolves. Unsurprisingly, federal legislators from the impacted states recoiled at the idea of reintroducing wolves and successfully led a push to pass a Congressional rider that defunded wolf reintroduction programs in Yellowstone and Central Idaho.¹¹⁶

In 1992, Defenders of Wildlife sued the Service to compel wolf reintroduction.¹¹⁷ In a relatively brief opinion, the court denied the plaintiff's request to force reintroduction because Congress had expressly defunded the reintroduction program, and moreover, the "Recovery Plan itself has never been

111. See, e.g., 2003 Rule, *supra* note 61, at 15810.

112. For the next five years following the 1982 amendments, nothing dramatic happened for Northern Rocky Mountain wolf recovery (although the Service employed 10(j) to reintroduce Red Wolf and Mexican Wolf populations). See, e.g., 50 C.F.R. § 17.84(c) (laying out permitted takings of Red Wolves); *Ctr. for Biological Diversity v. Jewell*, No. CV-16-00094-TUC-JGZ, 2018 WL 1586651 (D. Ariz. Mar. 31, 2018) (summarizing 1982 Mexican Wolf Recovery Plan).

113. 1987 RECOVERY PLAN, *supra* note 48, at iii.

114. *Id.* at 12.

115. Technically, the three recovery areas included areas in Central Idaho, Northwest Montana, and Yellowstone National Park. *Id.* at 13. Following this plan, in November 1991, Congress requested that the Service prepare an EIS that would analyze a range of alternatives to reintroducing wolves in Yellowstone and Central Idaho. See Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60252, 60254 (Nov. 22, 1994) (codified at 50 C.F.R. pt. 17) [hereinafter 1994 Rule].

116. Cheever, *supra* note 96, at 343; see also Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 1992, and for Other Purposes, Pub. L. No. 102-154, § 105, 105 Stat. 990, 993-94 (1991) (Congressional rider defunding wolf reintroduction).

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

an action document” and was therefore not binding.¹¹⁸ The court ultimately dismissed the case without prejudice, leaving the door open for additional lawsuits after the funding ban expired.¹¹⁹

In May 1994, after the ban expired, the Service published a final Environmental Impact Statement under the National Environmental Policy Act (the “1994 EIS”) for its wolf reintroduction plan, which the Secretary of the Interior quickly signed.¹²⁰ Shortly thereafter, the Service again released a proposed rule for reintroducing gray wolves in Yellowstone and Central Idaho.¹²¹ The rule created a massive experimental population area, including all of Wyoming and parts of Idaho and Montana.¹²² The final rule (the “1994 Rule”) involved releasing between 90 and 150 wolves, taken from Canada, into the areas around Yellowstone National Park and central Idaho over three to five years.¹²³

But how would the Service deal with the possibility that reintroduced gray wolf populations might overlap with each other and naturally occurring wolves, violating the 10(j) requirement that populations remain separate? At the time of its publication, the 1987 Recovery Plan confoundingly indicated that there were wolves present in all the proposed reintroduction areas.¹²⁴ Accordingly, it seemed unlikely that reintroduced wolves would simply ignore their naturally occurring counterparts.¹²⁵ As Cheever explained at the time:

[T]he USFWS [the Service] devised a bold plan to deal with the probability of overlap. The agency wagered that wolf resourcefulness and wolf fecundity would overcome the difficulties created by Section 10(j). USFWS hoped and still hopes that the Rocky Mountain wolf population will have recovered before the contradictions of experimental population law catch up with it. If USFWS succeeds, in a few years wolves will be numerous and unprotected, satisfying the demands of both environmentalists and local ranchers. If USFWS fails, wolves will still be scarce and, probably, fully protected, angering everyone.¹²⁶

The Service’s definition of “population” provided one safeguard against this possibility.¹²⁷ As part of the 1994 EIS, the Service had defined a wolf “pop-

118. *Id.* at 835. Although Congress had banned funding for reintroducing wolves, it had provided funding for the Service to prepare the EIS. *Id.* at 836.

119. *Id.* at 836.

120. 1994 Rule, *supra* note 115, at 60254.

121. Proposed Establishment of a Nonessential Experimental Population of Gray Wolf in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 42108, 42118 (Aug. 16, 1994).

122. *Id.* at 42112. For a detailed description of the experimental population area, see 1994 Rule, *supra* note 115, at 60256.

123. 1994 Rule, *supra* note 115, at 60252.

124. 1987 RECOVERY PLAN, *supra* note 48, at 36.

125. Under this approach the Service treated all wolves within the recovery area as part of the experimental population, regardless of their biological classification. Cheever, *supra* note 96, at 347-48 (describing this approach as “species zoning”).

126. *Id.* at 344.

127. *Id.* at 346.

ulation” as “at least two breeding pairs of gray wolves that each successfully raise at least two young to December 31 of their birth year for 2 consecutive years.”¹²⁸ This definition allowed for some degree of overlap between wandering wolves in Montana and reintroduced wolves without violating the “wholly separate geographically” requirement of 10(j) because “lone wolves, unsuccessful wolf breeding, or even one happy wolf family would not constitute a ‘population.’”¹²⁹ Accordingly, in the Recovery Plan, the Service describes the reported remaining wolves in all three areas as “predominantly lone wolves,”¹³⁰ “present[ing] no evidence of reproduction or pack activity”¹³¹ and noted that “there is no indication of resident or sustained pack activity or reproduction to date.”¹³² As a result, the “wholly separate geographically” requirement would not be violated because it only requires separation from “nonexperimental populations,” not individuals.¹³³

Additionally, the Service indicated that recovery could be achieved in such a short time that any problems raised by overlap would be avoided.¹³⁴ In fact, it predicted that:

this program, in conjunction with natural recovery in northwestern Montana and a similar reintroduction into central Idaho, would result in a viable recovered wolf population (ten breeding pairs in each of the three recovery areas for three consecutive years) by about the year 2002.¹³⁵

Accordingly, “if the wild northern wolves and the experimental southern wolves would refrain from interbreeding too obviously until 2002, [the Service] believed it would have an answer to the problem created by Section 10(j).”¹³⁶ Ultimately, the Service proceeded with its plan over opposition to the use of experimental populations in areas that already contained naturally occurring

128. 2003 Rule, *supra* note 61, at 15808; U.S. FISH & WILDLIFE SERV., THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO, ENVIRONMENTAL IMPACT STATEMENT 5 (July 1993).

129. Cheever, *supra* note 96, at 346.

130. 1987 RECOVERY PLAN, *supra* note 48, at 6.

131. *Id.* at 5.

132. *Id.*

133. 16 U.S.C. § 1539(j) (emphasis added).

134. Cheever, *supra* note 96, at 346.

135. Proposed Establishment of a Nonessential Experimental Population of Gray Wolf in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 42108, 42111 (Aug. 16, 1994) (to be codified at 50 C.F.R. pt. 17); Cheever, *supra* note 96, at 347.

136. Cheever, *supra* note 96, at 347.

wolves.¹³⁷ In 1995, the Service released fifteen wolves into central Idaho and fourteen wolves in Yellowstone National Park.¹³⁸

3. Wolves Go to Court

Shortly thereafter, a strange bedfellows coalition of the Wyoming Farm Bureau Federation and the National Audubon Society Predator Project sued the Service over its reintroduction plan (“*Wyoming I*”).¹³⁹ Among other things, plaintiffs alleged that the Service had violated Section 10(j) of the ESA by introducing wolves into an area that already contained naturally occurring wolves and that the Service could not maintain an experimental population because there is no geographic separation between naturally occurring and reintroduced wolves.¹⁴⁰ In response, the Service relied on the definition of “populations” claiming that the “wholly separate geographic” requirement applied to populations and not individuals.¹⁴¹

The district court upheld the Service’s definition of “population” under Section 10(j), but nonetheless found that the Service violated the “wholly separate geographically” requirement of Section 10(j).¹⁴² Specifically, the Service violated Section 10(j) by (1) concluding that no “populations” existed within the experimental areas, (2) treating all wolves within the experimental areas as nonessential experimental wolves, and (3) creating experimental populations in areas that are not “outside the current range of such species.”¹⁴³ In adding the 10(j) rule, Congress intended to add flexibility to managing reintroduced populations, not to remove protection of naturally occurring individuals of the same species.¹⁴⁴ The Service’s reintroduction plan was found to be “contrary to law.”¹⁴⁵ The “blanket treatment of all wolves found within the designated experimental population areas as experimental animals” and “reducing the ESA protections afforded to naturally occurring wolves, or any offspring *not* arising

137. As one commentator noted: “The amendment to section 10(j) of the Act states that experimental populations may only be designated when there is geographical separation between the experimental population and other existing populations of the species. The occasional occurrence of lone wolves in the areas of central Idaho and the Park would prohibit the use of the experimental population designation since there would be no geographic separation between natural occurring and experimental wolves.” *Id.* at 349 (citing 1994 Rule, *supra* note 115, at 60273-74).

138. *Id.* at 350; Dan Gallagher, *Biologists Prepare for Second Wolf Transplant*, AP (Nov. 12, 1995), <https://apnews.com/article/cdc0564f0e7cd9826dd3636315f385b0> [<https://perma.cc/W3TE-M6PH>].

139. *Wyo. Farm Bureau Fed’n v. Babbitt (Wyoming I)*, 987 F. Supp. 1349 (D. Wyo. 1997), *rev’d*, 199 F.3d 1224 (10th Cir. 2000).

140. *Id.* at 1370.

141. *Id.*

142. *Id.* at 1371–74.

143. *Id.* at 1373–75.

144. *Id.* at 1373.

145. *Id.* at 1375.

solely from an experimental population” acted as a de facto delisting.¹⁴⁶ In setting aside the reintroduction plan, the court also ordered that reintroduced non-native wolves be removed from the experimental population areas.¹⁴⁷

Meanwhile, in Montana, courts took a dramatically different approach. Shortly after *Wyoming I*, a wolf wandered from the Yellowstone area to Red Lodge, Montana, where Chad McKittrick shot and killed it.¹⁴⁸ A jury convicted Mr. McKittrick of, among other things, taking and possessing the wolf in violation of the ESA.¹⁴⁹ As a defense, McKittrick claimed that the Service had improperly designated the gray wolf experimental population in Yellowstone.¹⁵⁰ Specifically, he claimed that:

(1) FWS may not draw members of an experimental population from an unlisted population, such as Canadian gray wolves; (2) the experimental population is invalid because it is not “wholly separate geographically” from naturally occurring wolves in the release area; (3) the experimental population regulations are invalid because the Secretary did not make a finding required by ESA Section 4(d); and (4) the regulations are invalid because the Secretary did not comply with ESA Section 4(f).¹⁵¹

First, the court held that the wolves in the experimental population were protected under the ESA notwithstanding their Canadian origins because “gray wolves are protected by the ESA based on where they are found, not where they originate.”¹⁵² Imposing such a requirement would force the Service “to create an experimental wolf population only by depleting threatened or endangered populations in the United States,” which “offends the statute’s essential purpose, which is conservation of the species.”¹⁵³ Second, the court disagreed with McKittrick’s claim that the reintroduced wolves were not “wholly separate geographically” from naturally occurring wolves and held that the experimental population was *valid*.¹⁵⁴ Although McKittrick relied on similar arguments as the plaintiffs in *Wyoming I*, the court in *McKittrick* came

146. *Id.* at 1375–76.

147. *Id.* at 1376. Ultimately, the wolves were not removed because the court stayed its judgment pending appeal. *Id.*

148. *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998), *cert denied*, 525 U.S. 1072 (1999).

149. *Id.* at 1172–73. Specifically, he was convicted on three counts: (1) “taking the wolf in violation of 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(3); (2) possessing the wolf in violation of 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(5); and (3) transporting the wolf in violation of the Lacey Act, 16 U.S.C. §§ 3372(a)(1), 3373(d)(2).” *Id.*

150. *Id.* at 1173.

151. *Id.*

152. *Id.* (“Therefore, the wolves transported from Canada *were* members of ‘any population . . . of an endangered species or threatened species’ as soon as they entered the United States.”) (omission in original).

153. *Id.* at 1174.

154. *Id.* at 1175.

to a different conclusion.¹⁵⁵ The court in *McKittrick* also upheld the Service's definition of "population" but disagreed with the Wyoming court, which held that 10(j) must apply to individuals as well as populations.¹⁵⁶ Accordingly, the court in *McKittrick* deferred to the Service's interpretation of 10(j) that the "wholly separate geographically" requirement only apply to populations, and not individuals.¹⁵⁷

The rules that emerged from *McKittrick* and *Wyoming I* remained in conflict until 2000, when the Tenth Circuit Court of Appeals overturned the latter in *Wyoming Farm Bureau Fed'n v. Babbitt* ("Wyoming II").¹⁵⁸ That case clarified that the Service could reintroduce wolves into an area that contained individual wolves, so long as no "populations" were present.¹⁵⁹

On appeal, the *Wyoming II* court analyzed the validity of the 1994 Rule, which authorized the reintroduction of gray wolves into Yellowstone and central Idaho.¹⁶⁰ The court considered whether (1) the rule violates the provisions of Section 10(j)(1) that require that experimental populations be wholly separate geographically from nonexperimental populations of the same species;¹⁶¹ (2) classifying all wolves—including naturally occurring ones—within the experimental areas as nonessential experimental animals illegally denied them the full protection of the ESA by "de facto 'delisting' naturally occurring lone dispersers;"¹⁶² and (3) the Service violated Section 7 of the ESA by failing to consider the impacts that introducing Canadian wolves would have on the genetically distinct subspecies that naturally existed in Yellowstone and Wyoming.¹⁶³

On the issue of geographic separation, the court confirmed the holding in *McKittrick* that lone wolves do not constitute populations and would

155. *McKittrick* also pointed to sightings of individual native wolves in the release area. *Id.*

156. *Id.*

157. *Id.* The court also affirmed the other convictions of the lower court but remanded the case on the issue of "whether *McKittrick* satisfied his burden to show acceptance of responsibility under U.S.S.G. § 3E1.1." *Id.* at 1178.

158. *Wyo. Farm Bureau Fed'n v. Babbitt* (Wyoming II), 199 F.3d 1224 (10th Cir. 2000).

159. For further discussion, see generally Brian Bramblett, *Wolves in the West: The Triumph of Section 10(j) of the Endangered Species Act*, 22 PUB. LAND & RES. L. REV. 133 (2001) (arguing that *Wyoming II* was correctly decided); Daniel R. Dinger, *Throwing Canis Lupus to the Wolves: United States v. McKittrick and the Existence of the Yellowstone and Central Idaho Experimental Wolf Populations Under A Flawed Provision of the Endangered Species Act*, 2000 BYU L. REV. 377 (2000) (arguing that *Wyoming II* was wrongly decided); Elizabeth Cowan Brown, *The "Wholly Separate" Truth: Did the Yellowstone Wolf Reintroduction Violate Section 10(J) of the Endangered Species Act?*, 27 B.C. ENV'T. AFF. L. REV. 425 (2000) (arguing that 10(j) should be interpreted in light of its purpose to promote flexibility).

160. *Wyoming II*, 199 F.3d at 1228.

161. *Id.* at 1233.

162. *Id.* at 1236 (internal quotations omitted).

163. *Id.* at 1238.

therefore not overlap with reintroduced populations.¹⁶⁴ The court relied heavily on Congress's intent to grant the Service increased management flexibility.¹⁶⁵ It mattered not, then, that individual wolves might overlap with a reintroduced population because individuals would not constitute a population.¹⁶⁶ Furthermore, even if two lone wolves crossed paths, they would not constitute a population because "it is highly unlikely a lone wolf will encounter another solitary wolf of the opposite sex and reproduce for two years running, the populations left behind by the lone wolves do not expand simply because they travel away."¹⁶⁷ Moreover, the purpose of the ESA was "to conserve and recover *species*, not just individual animals."¹⁶⁸ The court was not persuaded by the fact that populations are comprised of individual wolves and that it may be challenging to recover a species without individual animals.¹⁶⁹ Ultimately, the court held that the Service did not violate the provisions of Section 10(j) that prevent reintroducing populations in the current range of a naturally existing population because the Service permissibly interpreted "current range" to be the "scope of territories defended by the breeding pairs of an identifiable wolf pack or population," not merely individuals.¹⁷⁰

Relying again on the increased flexibility provided by the 10(j) rule, the court similarly rejected the district court's holding that the reintroduction rule acted as a de-facto delisting and failed to afford full protections to naturally occurring wolves and their offspring.¹⁷¹ Accordingly, the Service acted within its authority when it classified the experimental population based on a geographic boundary, including naturally occurring wolves found within it.¹⁷² The Service was not required to classify an experimental population based on its origin, but could do so "on the basis of *location*, migration pattern, or any other criteria."¹⁷³ The Service therefore had the authority to tailor its recovery strategies for the species, and "the plain language of Section 10(j)(1) [is] an expression of Congress' intent to protect the Secretary's authority to designate when and where an experimental population may be established, not . . . a limitation on the Secretary's flexibility."¹⁷⁴ In sum, the court upheld the broad authority of the Service to use 10(j) to manage reintroduced populations as it likes.¹⁷⁵

164. *Id.* at 1235-36.

165. *Id.* at 1234.

166. *Id.*

167. *Id.*

168. *Id.* at 1235 (emphasis added).

169. *Id.* at 1233.

170. *Id.* at 1236.

171. *Id.*

172. *Id.*

173. *Id.* at 1237 (quoting H.R. Conf. Rep. No. 97-835, 97th Cong., 2d Sess. at 34 (1982) (emphasis in original)).

174. *Id.*

175. *Id.* "While the protection of individual animals is one obvious means of achieving that goal, it is not the only means." *Id.*

Finally, the court dismissed claims that reintroducing Canadian wolves would harm the naturally occurring subspecies.¹⁷⁶ Specifically, the court held that the Service had correctly determined that reintroduction would not threaten naturally occurring species because (1) there was insufficient evidence to demonstrate that any wolf population existed in the reintroduction areas at the time of reintroduction; (2) historically recognized subspecies do not deserve recognition under modern taxonomic classification methods; and (3) even if a subspecies did exist, it would have already overlapped with the Canadian wolves.¹⁷⁷ The court agreed with the Service that there was not sufficient evidence to find that any subspecies existed in the reintroduction area.¹⁷⁸

Ultimately, the court upheld the 1994 Rule and allowed the Service to continue its plans to reintroduce wolves into Yellowstone and central Idaho.¹⁷⁹ This decision remedied the tension between *McKittrick* and the district court decision in *Wyoming I*. Moreover, it confirmed the Service's broad discretion to use Section 10(j) to manage reintroduced populations in any way that it determined would "promote the protection and, ultimately, the recovery of endangered and threatened species."¹⁸⁰ In the case of wolves, this means that so long as the recovery of the species is the goal, it can be achieved at the expense of individual wolves.¹⁸¹

4. The Wolves Are (Perhaps Too) Fruitful, and Multiply

Oblivious to the goings-on in courts, wolves went about doing what wolves do, with some gusto. In 2000, the Northern Rocky Mountain wolf population met the Service's numeric recovery goal of 30 breeding pairs and 300 wolves (433 and counting) for the first time.¹⁸² While this sparked the Service's interest in delisting the wolves, the populations still had to maintain their progress through 2003, at which point the Service could propose to delist the wolves.¹⁸³

Following the apparent recovery of the gray wolf and the decision in *Wyoming II*, the Service initiated a rulemaking in July 2000 to reduce protections for the gray wolf.¹⁸⁴ In its final rule, the Service created three distinct population

176. *Id.* at 1238.

177. *Id.* at 1239.

178. *Id.* The court also considered whether the Service violated the National Environmental Policy Act by failing to analyze environmental impacts of wolf reintroduction and found that the Service did not violate NEPA. *Id.* at 1240.

179. *Id.* at 1241.

180. *Id.* at 1237.

181. "It is not difficult to imagine that sound population management practices tailored to the biological circumstances of a particular species could facilitate a more effective and efficient species-wide recovery, even if the process renders some individual animals more vulnerable. However, neither Congress nor this court are equipped to make that type of species management decision. Recognizing that fact, Congress left such decisions to the Department." *Id.*

182. 2003 Rule, *supra* note 61, at 15815.

183. *Id.* at 15818.

184. See Proposal To Reclassify and Remove the Gray Wolf From the List of Endangered

segments (DPSs): the Eastern, Western, and Southwestern DPSs (the “2003 Rule”).¹⁸⁵ The 2003 Rule reclassified the Eastern DPS and Western DPS from endangered to threatened, except where gray wolves were already listed as threatened or there was an existing experimental population.¹⁸⁶ Accordingly, the wolves in the Yellowstone and Central Idaho experimental populations were not affected, and neither were Mexican Wolves in the southwest. The remaining states outside the experimental populations lacked significant wolf populations and the states had inadequate regulatory mechanisms to conserve the species as it dispersed.¹⁸⁷ As a result, any wolves found outside the experimental population areas were treated as threatened under the new rules.

In addition to reclassifying the populations of wolves, the 2003 Rule also included 4(d) regulations for threatened, non-experimental wolf populations.¹⁸⁸ These new rules for the Eastern and Western DPSs were intended to promote conservation of the gray wolf by “reducing actual and perceived conflicts with human activities, thus reducing the likelihood and extent of illegal killing of wolves.”¹⁸⁹ The 4(d) rule is similar to the special rules that remained in effect for the experimental populations except for a few key differences.¹⁹⁰ Notably, the 4(d) rules (1) allowed permits that authorized private landowners to harass wolves on private property and near grazing livestock in an injurious manner; (2) expanded the circumstances in which private landowners may kill wolves seen attacking livestock;¹⁹¹ and (3) decreased the restrictions for government take of “problem wolves.”¹⁹² In other words, not for the first or last

and Threatened Wildlife in Portions of the Conterminous United States; Proposal to Establish Three Special Regulations for Threatened Gray Wolves, 65 Fed. Reg. 43450, 43450 (proposed July 13, 2000) (to be codified at 50 C.F.R. pt. 17).

185. 2003 Rule, *supra* note 61, at 15804. The Western DPS included California, Idaho, Montana, Nevada, and parts of Utah and Colorado. *Id.* at 15818. The Eastern DPS covered North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Michigan, Indiana, Ohio, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine. *Id.* Finally, the Southwestern DPS encompassed Arizona, New Mexico, parts of Utah, Colorado, Oklahoma, and Texas. *Id.*

186. *Id.* at 15804.

187. First Amended Complaint, *Defs. of Wildlife et al. v. U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2003).

188. 2003 Rule, *supra* note 61, at 15863.

189. *Id.* at 15864.

190. *See id.* at 15864-66 tbl. 1.

191. For example, in experimental population areas, there must be more than six breeding pairs to kill a depredating wolf. In the DPSs, that requirement is not present. *Id.* at 15866. “Because such take has to be reported and confirmation of livestock attacks must be made by agency investigators, we anticipate that no additional significant wolf mortality will result from this provision. However, those few wolves that are killed will be *animals with behavioral traits that were not conducive to the long-term survival and recovery of the wolf in the northern Rocky Mountains.*” *Id.* (emphasis added).

192. Problem wolves are defined as “wolves that (1) attack livestock or (2) twice in a calendar year attack domestic animals other than livestock.” *Id.* at 15865.

time, the Service paradoxically sought to protect and sustain wolf populations by making it easier to kill wolves.

By many accounts, this marked the start of a new “minimalist” approach to wolf recovery.¹⁹³ To support the rulemaking, the Service embraced a narrower definition of “range” in listing and delisting criteria to only include currently occupied areas. This, combined with expansive DPSs, allowed the Service to reach the conclusion that the species was “not in danger of extinction throughout its range within the...DPS.”¹⁹⁴

More importantly, the 2003 Rule perhaps marks the first time that the Service began seriously considering removing wolves from the endangered species list altogether. In the 2003 Rule, the Service noted that wolves in the Northern Rocky Mountains had met the recovery criteria of the 1994 Recovery Plan for a number of years.¹⁹⁵ Later in 2003, the Service confirmed that the wolves still met the recovery goals, allowing the Service to move forward with its delisting efforts.¹⁹⁶ In addition to meeting the numerical recovery criteria, dispersing wolves had formed a number of packs outside of the designated recovery areas, casting doubt on the Service’s prior assumption that dispersing individuals could not create “populations” and possibly fueling the Service’s hasty attempt to delist wolves before their spread became a problem.¹⁹⁷

In order to delist the Northern Rocky Mountain wolf population, the Service had to find “that the population has recovered *and* it [was] reasonably assured that wolves would not become threatened again if the ESA protections were removed.”¹⁹⁸ To make a delisting determination, the Service stated that “it must show that . . . other existing regulatory mechanisms will adequately remove or reduce the threat to the species.”¹⁹⁹ Because state-level management plans are not included as part of the ESA, the Service could not mandate them, but they would be a significant factor in assessing a proposal to delist the gray wolf.²⁰⁰ Thus, in addition to analyzing the recovery status of gray wolves,

193. See Goble, *supra* note 7, at 610 (describing the Service’s approach to implementing the ESA in the new millennium as “minimalism that verges on hostility”). Furthermore, this narrow definition that “exclude[s] all but a core population . . . not only undercuts the ESA’s conservation purposes but also ignores the reasons for conserving biodiversity . . . Recovery, however, is more than the prevention of extinction.” *Id.*

194. 2003 Rule, *supra* note 61, at 15810-11; see also Goble, *supra* note 7, at 591-95 (detailing the Service’s efforts to delist gray wolves).

195. 2003 Rule, *supra* note 61, at 15818. “In 2000, when the Service proposed to reclassify these wolves to threatened status, the year 2000 was the fourth successive year of having 20 or more breeding pairs in the northern Rocky Mountains. The Service considered this to fully meet the intent of the downlisting goal. Since that time, the wolf population has continued to grow even larger and should no longer be considered endangered.” *Id.*

196. U.S. FISH & WILDLIFE SERV. ET AL., ROCKY MOUNTAIN WOLF RECOVERY 2003 ANNUAL REPORT 32 (2004) [hereinafter 2003 REPORT].

197. *Id.* at 10-13.

198. *Id.* at 32 (emphasis in original).

199. 2003 Rule, *supra* note 61, at 15837.

200. *Id.* at 15837.

the Service also reviewed state management plans that had been submitted by Montana, Idaho, and Wyoming.²⁰¹ These plans, according to the Service, would provide the needed protections for wolves to not become endangered or threatened if ESA protections were removed.²⁰²

In January 2004, the Service determined that Montana and Idaho's state management plans were adequate, but that the Wyoming plan was inadequate because it would have considered wolves "trophy game" in Yellowstone National Park and "predators" throughout the remainder of the state.²⁰³ Under Wyoming's plan, predatory animals could be killed in any manner and at any time, with few exceptions,²⁰⁴ whereas killing "trophy game" without a permit was illegal.²⁰⁵ The Service rejected Wyoming's plan because it provided insufficient protections for wolves.

On January 6, 2005, following complaints from states that "wolves were having 'unacceptable impacts,'" the Service modified the 10(j) provisions for the experimental populations.²⁰⁶ Subsequently, both sides promptly challenged the 2003 Rule. First, Wyoming unsuccessfully sued the Service, claiming that it violated the ESA by rejecting the state's wolf management plan.²⁰⁷ Additionally, plaintiffs in both Vermont and Oregon sued the Service challenging the 2003 Rule.²⁰⁸ In both cases, the courts vacated the 2003 Rule because the Service acted arbitrarily and capriciously by only considering threats to wolves within their current range without analyzing threats outside their range and by expanding the boundaries of the DPSs to the wolf's entire historical

201. 2003 REPORT, *supra* note 199, at 32-33.

202. *Id.* at 32.

203. *Id.* at 33.

204. Wyo. Stat. Ann. § 23-3-103 (West) ("Predatory animals and predacious birds may be taken without a license in any manner and at any time except as provided by W.S. 23-2-303(d) and (e), 23-3-112, 23-3-304(b), 23-3-305 and 23-3-307").

205. Wyo. Stat. Ann. § 23-3-102(a) (West).

206. Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf, 70 Fed. Reg. 1285, 1299-1302 (January 6, 2005) (codified at 50 C.F.R. pt. 17) [hereinafter 2005 Rule]; *see also* Rob Dubuc, *The Northern Rocky Mountain Wolf Delisting: What Would Leopold Think?*, 32 ENVIRONS ENV'T L. & POL'Y J. 215, 252-54 (2009) (detailing changes to final plan).

207. *See* Wyoming v. U.S. Dept. of Interior, 360 F. Supp. 2d 1214 (D. Wyo. 2005), *aff'd sub nom.*, 442 F.3d 1262 (10th Cir. 2006). Wyoming argued that the Service (1) violated its duty to control wolf depredations; (2) had a mandatory duty to delist the gray wolf; and (3) infringed on Wyoming's sovereignty by preventing the state from assuming management authority over the gray wolves in Wyoming. Wyoming was unsuccessful in its claims because, among other reasons, it failed to show that there was a final agency action and the court therefore lacked jurisdiction. *Id.* at 1231.

208. *See* Defs. of Wildlife v. Sec'y, U.S. Dep't of the Interior, 354 F. Supp. 2d at 1156, 1163 (D. Or. 2005); Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005). Conservation groups based in both states had standing because the final rule would reduce wolf populations throughout the historic range—including both Oregon and Vermont. *See, e.g.* Order Denying Motion to Transfer Venue at 7, National Wildlife Federation v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005) (No. 1:03-cv-340).

range.²⁰⁹ By only considering the recovery status of gray wolves within the DPS, the 2003 Rule effectively “[made] all other portions of the wolf’s historical . . . range . . . insignificant and unworthy of stringent protection.”²¹⁰ This interpretation was “contrary to the plain meaning of the ESA phrase” and therefore arbitrary and capricious.²¹¹

Following these decisions, in 2006, Wyoming again petitioned the Service to delist gray wolves in the Northern Rockies.²¹² In July 2006, the Service denied this petition, again citing Wyoming’s deficient management plan.²¹³ The Service stated that it could not approve a plan until the state committed to maintaining minimum population numbers of gray wolves.²¹⁴

These victories for gray wolf conservation did not last long. On February 8, 2007, the Service issued a proposed rule (the “2007 Proposed Rule”) to create a new Northern Rocky Mountain DPS that would include all of Montana, Idaho, and Wyoming, along with parts of Washington and Oregon.²¹⁵ The 2007 Proposed Rule would also simultaneously delist the newly created DPS.²¹⁶ This was contingent on the Service accepting Wyoming’s state management plan, which the Service did when it issued the final rule (the “2007 Rule”) creating the new DPS and simultaneously removing it from the endangered species list.²¹⁷ By approving Wyoming’s revised management plan, the Service concluded that wolves in the Northern Rocky Mountains no longer needed the protection of the Endangered Species Act.²¹⁸ Unlike previous changes to DPSs, this rule removed protections for all gray wolves in Montana, Wyoming, Idaho, and parts of Washington and Oregon, including for those that formerly belonged to the experimental populations.²¹⁹

209. *Defs. of Wildlife*, 354 F. Supp. 2d at 1172.

210. *Wildlife Fed’n*, 386 F. Supp. 2d at 566.

211. *Id.*

212. Associated Press, *Wyoming’s Petition on Gray Wolves Is Denied*, N.Y. TIMES, July 25, 2006, <https://www.nytimes.com/2006/07/25/us/25brfs-001.html> [<https://perma.cc/P6KM-46SR>].

213. *Id.*

214. *Id.*

215. 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, Proposed Rule, 72 Fed. Reg. 6106, 6106 (Feb. 8, 2007) [hereinafter 2007 Proposed Rule].

216. *Id.*

217. *Id.*; 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, 10514 (Feb. 27, 2008) (codified at 50 C.F.R. pt. 17) [hereinafter 2008 Final Rule].

218. Technically, the law had been passed but was not yet in effect, and the Service made its Final Rule conditional on the law taking effect. 2008 Final Rule, *supra* note 217, at 10557.

219. *Id.* at 10560.

This marked the first time since their listing over twenty years earlier that the entire Northern Rocky Mountain wolf population lost federal protection. The loss was short lived as once again wolves found friends in the federal judiciary. Petitioners challenged the 2007 Rule in court and the court in *Defenders of Wildlife v. Hall*, reinstated the Northern Rocky Mountain wolf's protections while the case was pending.²²⁰

During this same period, gray wolves in the Great Lakes had also come under fire, legally and literally. In 2007, the Service, using a similar strategy as with the Northern Rocky Mountains, created the Western Great Lakes DPS and simultaneously removed it from the list of endangered species.²²¹ The rule was vacated after a D.C. district court held, in *Humane Society v. Kempthorne*, that the Service violated the ESA by designating a DPS "to 'carve out' healthy sub-populations of otherwise endangered or threatened species and remove from those sub-populations the protections of the Act."²²² That is to say, the Service could not create a DPS "for the sole purpose of delisting that species."²²³

5. The Obama Administration Steps In, With Some More of the Same

Oblivious to these legal machinations, wolves continued to ignore restrictions imposed upon them, and a new, more conservation-minded administration (at first blush, at least) took the reins in 2009. In response to the Montana district court's ruling in *Hall*, the Service promulgated another final rule (the "2009 Rule") on April 2, 2009.²²⁴ Similar to what it had done in the 2008 Rule, the Service created a DPS of the gray wolf in the Northern Rocky Mountains (excluding Wyoming) and simultaneously delisted it.²²⁵ In response to the district court's order in *Hall*, the Service reexamined Wyoming's state management plan and eventually approved Wyoming's revised management plan.²²⁶

220. *Def. of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1178 (D. Mont. 2008) (granting preliminary injunction).

221. Final Rule Designating the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf From the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6052, 6052 (Feb. 8, 2007) (codified at 50 C.F.R. pt. 17).

222. *Humane Soc'y of U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 14 (D.D.C. 2008).

223. *Id.* In response to this ruling the Solicitor of the U.S. Department of the Interior issued a memo that clarified the statutory interpretation issues that the court in *Kempthorne* had raised, and concluded that the Service did, in fact, have the authority to "remove healthy DPSs from broader-listed species." U.S. DEP'T OF THE INTERIOR, OFF. OF THE SOLICITOR, M-37018, U.S. FISH AND WILDLIFE SERVICE AUTHORITY UNDER SECTION 4(C)(I) OF THE ENDANGERED SPECIES ACT TO REVISE LISTS OF ENDANGERED AND THREATENED SPECIES TO "REFLECT RECENT DETERMINATIONS" (2008).

224. 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, 15123 (April 2, 2009) (codified at 50 C.F.R. pt. 17) [hereinafter 2009 Rule].

225. *Id.*

226. 2009 Rule, *supra* note 224, at 15184. See Jesse H. Alderman, Note, *Crying Wolf: The Unlawful Delisting of Northern Rocky Mountain Gray Wolves from Endangered Species Act*

Shortly thereafter, Montana and Idaho both authorized public wolf hunts that were scheduled to begin in September 2009.²²⁷ Unable to obtain a preliminary injunction, a number of environmental plaintiffs challenged the 2009 Rule.²²⁸ In *DOW v. Salazar*, the Montana district court vacated the 2009 Rule, because it determined that it was unlawful not to protect the entire DPS.²²⁹ While the Service had attempted to find a solution to Wyoming's deficient regulations, the court ultimately found the solution unsuccessful: “[e]ven if the Service’s solution is pragmatic, or even practical, it is at its heart a political solution that does not comply with the ESA.”²³⁰

Noticing this regulatory whiplash, Congress stepped in and took matters into its own hands. During the 112th Congress (2011–2012), two Senators from Idaho and Montana successfully attached a rider to a must-pass appropriations bill to avoid a government shutdown.²³¹ The rider required the Secretary of the Interior to reissue the 2009 Rule and exempted it from judicial review.²³² Accordingly, with the exception of Wyoming, Congress returned Northern Rocky Mountain wolf management to the states.²³³

It wasn't long before the Wyoming wolves lost what few protections remained.²³⁴ In 2012, the Service removed the Wyoming wolves from the endangered species list after it determined that the Wyoming populations had sufficiently recovered and that any remaining threats were sufficiently

Protections, 50 B.C. L. REV. 1195 (2009) for additional discussion of the 2009 Rule.

227. *Defs. of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1214 (D. Mont. 2010).

228. *See id.*

229. *Id.* at 1228.

230. *Id.*

231. Brandon Berrett, *Is Defenders of Wildlife v. Salazar Correct That Successful State Management of Recovered Rocky Mountain Gray Wolves Is Not Compatible with the Endangered Species Act?*, 47 IDAHO L. REV. 595, 636 (2011); Department of Defense and Full-Year Continuing Appropriations Act, 2011, H.R.J. Res. 1473, 112th Cong., 125 Stat. 38 (2011) (enacted).

232. Department of Defense and Full-Year Continuing Appropriations Act, 2011, H.R.J. Res. 1473, 112th Cong. § 1713 (2011) (enacted).

233. This was described as an “unprecedented ‘congressional delisting’” in Berrett, *supra* note 231, at 637.

234. Around this time, the Service also designated a Western Great Lakes DPS and simultaneously delisted it. Revising the Listing of the Gray Wolf (*Canis lupus*) in the Western Great Lakes, 76 Fed. Reg. 81,666 (Dec. 28, 2011) (codified at 50 C.F.R. pt. 17). In doing so, the Service further refined the definition of “range” to be limited to current, and not the historical range of WGL wolves. *See Humane Soc’y of the U.S. v. Zinke*, 865 F.3d 585, 603 (D.C. Cir. 2017) (upholding the interpretation of “range”); *see also* Frank Sturges, Comment, *Humane Society of the United States v. Zinke* (D.C. Cir. 2017): *Shifting Baselines in the Endangered Species Act*, 43 HARV. ENV’T. L. REV. 225 (2011) (describing how the problem of “shifting baselines” undervalues species’ historical range); Amy Collier, Note, “*This Land Was Made for You and Me*” -and Them: *Why and How the Department of the Interior Should Give Greater Consideration to the Gray Wolf’s Historical Range*, 45 ECOLOGY L. Q. 289 (2018) (illustrating how greater understanding of the gray wolf’s historical range can guide recovery and management).

minimized (the “2012 Rule”).²³⁵ The Service had collaborated with the State of Wyoming to revise its wolf management plan such that gray wolves would be treated as trophy animals in a portion of the state and as predatory animals in the rest.²³⁶ But wolves in Yellowstone National Park and the Wind River Indian Reservation remained out of state jurisdiction.²³⁷ In Wyoming, trophy animals are managed by the Wyoming Game and Fish Commission, which sets hunting seasons, methods of take, and the numbers of wolves that can be taken.²³⁸ Predatory animals, on the other hand, are subject to few regulations within the state and may be killed by anyone, with limited restrictions.²³⁹ Not only did Wyoming’s plan require it to maintain ten breeding pairs of wolves and at least 100 wolves, but it also had to maintain a buffer above those numbers.²⁴⁰ Wyoming’s plan treated the wolves in Yellowstone National Park and the Wind River Indian Reservation as that buffer without any additional binding assurances, which the Service accepted.²⁴¹ The Service concluded that although “wolf packs are unlikely to survive in portions of Wyoming where they are designated as predatory animals . . . portions outside the predator area are large enough to support Wyoming’s management goals and a recovered wolf population.”²⁴²

Through a series of legal challenges, conservationists were able to restore some of the protections for gray wolves throughout the Northern Rocky Mountains. Initially, a group of environmental organizations sued the Department of the Interior, challenging the constitutionality of the 2011 Appropriations Act that reissued the 2009 Rule.²⁴³ Plaintiffs were unsuccessful, and the Ninth Circuit Court of Appeals held that Congress was entitled to amend the law and did not violate the separation of powers.²⁴⁴

In November 2012, just two months after the 2012 Rule was promulgated, environmental organizations challenged it and sued the Service.²⁴⁵

235. Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population’s Status as an Experimental Population, 77 Fed. Reg. 55530, 55533 (Sept. 10, 2012) (codified at 50 C.F.R. pt. 17) [hereinafter 2012 Rule]; Letter to Wyoming Governor Mead from FWS Director Ashe (Jan. 9, 2012), FWS Document ID FWS-R6-ES-2011–0039–7456.

236. 2012 Rule, *supra* note 235, at 55533.

237. *Id.*

238. *Id.* at 55589.

239. *Id.* at 55590.

240. *Id.* at 55535.

241. *Id.*

242. *Id.* at 55590.

243. See *All. for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012).

244. *Id.* at 1175. For further discussion of *Wild Rockies*, see Emily A. Cathcart, Note, *All Bite and No Bark: Nonspecific Magic Words Sweep Aside Constitutional Concerns and Remove the Northern Rocky Mountain Gray Wolf from Endangered Species Act Protection in Alliance for the Wild Rockies v. Salazar*, 24 VILL. ENV’T L.J. 253 (2013).

245. *Defs. of Wildlife v. Jewell*, 68 F. Supp. 3d 193, 201 (D.D.C. 2014), *aff’d in part, rev’d in part sub nom.* *Defs. of Wildlife v. Zinke*, 849 F.3d 1077 (D.C. Cir. 2017).

While the reissued 2009 Rule remained in effect, *Defenders of Wildlife v. Jewell* set aside the 2012 Rule that transferred management of Wyoming's wolves to the state.²⁴⁶ Most notably, plaintiffs claimed that the Service improperly relied on Wyoming's non-binding commitment to maintain a buffer that was essential to the Service's delisting decisions.²⁴⁷ Because the decision to delist the wolves in Wyoming was "expressly premised on the state's intention to manage to maintain a buffer," it was impermissible for the Service to rely on "unenforceable statements of intent."²⁴⁸

In 2017 the Wyoming wolves lost the last of their federal protection under the ESA when a D.C. Court of Appeals reversed *Jewell*.²⁴⁹ The court in *Zinke* held that it was entirely permissible for the Service to rely on Wyoming's nonbinding commitments to maintain buffers to the required wolf populations because "[n]othing in the ESA demands that level of certainty."²⁵⁰ Moreover, the court agreed with the Service that—notwithstanding Wyoming's historic animus towards wolves—"in light of Wyoming's plan to manage for a buffer, especially given the State's own interests, Wyoming has established an adequate regulatory framework."²⁵¹ As a result, the district court vacatur of the 2012 Rule was reversed and the 2012 Rule was reinstated, transferring management of the gray wolf in Wyoming to the state. At this point, the gray wolf was delisted in the entire Northern Rocky Mountain region.²⁵²

Although the Northern Rocky Mountain wolves had been successfully removed from the endangered species list, on March 15, 2019, the Service went further and proposed a rule removing ESA protections from the remaining

246. *Def. of Wildlife v. Jewell*, 68 F. Supp. 3d at 217.

247. *Id.* at 195.

248. *Id.* at 207. The court noted, however, that while The Service was not restricted from relying on nonbinding statements, it was impermissible here because the plan controlled a critical factor in the delisting decision. *Id.* at 209. For further discussion of *Defenders of Wildlife v. Jewell*, see Edward A. Fitzgerald, *Humane Society v. Jewell: The Court Cries Wolf*, 46 ENV'T L. REP. NEWS & ANALYSIS 10020 (2016); Rachel Kenigsberg, *Defenders of Wildlife v. Jewell: Environmentalists Win the Latest Battle in the Fight over Gray Wolves, but Who Will Win the War?*, 23 BUFF. ENV'T L.J. 1, 14 (2016) ("This new requirement is essential for effective species protection because it is illogical to allow non-binding regulatory mechanisms to be the basis of delisting since the non-binding nature of potential state plans 'make[s] their protections illusory.'").

249. See *Def. of Wildlife v. Zinke*, 849 F.3d at 1077. In the meantime, the Service had issued a proposed rule in 2013 to delist the gray wolf. See *Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (Canis lupus baileyi) by Listing It as Endangered*, 78 Fed. Reg. 35,664, 35,664 (June 13, 2013). A final rule was never promulgated.

250. *Def. of Wildlife v. Zinke*, 849 F.3d at 1084.

251. *Id.* at 1082. Wyoming's incentives included the threat of relisting and violating Wyoming law if wolf populations dropped below required levels. *Id.* at 1083.

252. *Endangered and Threatened Species: Removing the Gray Wolf (Canis lupus) from the List of Endangered and Threatened Wildlife*, 85 Fed. Reg. 69778, 69895 (Nov. 3, 2020) (codified at 50 C.F.R. pt. 17) [hereinafter 2020 Rule].

gray wolves in the US (excluding Mexican wolves and Red wolves).²⁵³ At the time, gray wolves in the Northern Rocky Mountains were delisted, but gray wolves in Minnesota remained listed as threatened.²⁵⁴ Mexican wolves (*Canis lupus baileyi*) were listed as an endangered subspecies and gray wolves (*Canis lupus*), as a species, were listed as endangered.²⁵⁵ On November 3, 2020, the Service published the final rule (the “2020 Rule”), removing the remaining ESA protections for gray wolves in the lower 48 states.²⁵⁶ The 2020 Rule did not affect Northern Rocky Mountain wolves because they had already lost their protections; the Service reasoned that wolves in the remaining areas were similar enough and that so long as they were not threatened or endangered in some of their range, the entire population could not be threatened or endangered.²⁵⁷

While the ESA does not require a species to be recovered *everywhere*, it likely requires recovery in more than just one area. One peer reviewer observed: “More than four decades [after the 1978 Rule] the Service is in effect attempting an end run around this earlier commitment to geographically comprehensive conservation, by proposing to delist the species *Canis lupus* based on the recovery of one subspecies.”²⁵⁸

This, of course, is not the end of the story. Since its publication, challengers have sought to vacate the 2020 Rule’s delisting²⁵⁹ and, on February 10, 2022, a district court vacated the 2020 Rule, restoring ESA protections to wolves in most states.²⁶⁰ But the Northern Rocky Mountain wolf remained without protection, as it had been removed from the list of endangered and threatened species prior to the 2020 Rule. Nevertheless, a number of conservation groups and Tribes have petitioned the Service to restore protections to the Northern Rocky Mountain wolves.²⁶¹

253. *Id.* at 69780.

254. *Id.*

255. *Id.* at 69779-80.

256. *Id.* at 69778. In addition to other groups opposing the rule, many Tribes accused The Service of violating its obligations to Tribal interests: “Clearly, gray wolf delisting threatens tribal nations with the same Trojan Horse they faced with grizzly delisting, those consequences being but not limited to: undermining tribal sovereignty, violations of treaty rights and reserved treaty rights, the abrogation of religious liberty, and unconstitutional actions vis-a-viz Article I, Section 8, Clause 3 of the US Constitution and Article VI. Once again, the supreme law of the land cannot be invalidated for political expediency, no matter the modus operandi of the president that is rife throughout this current administration.” Letter from Global Indigenous Council, to U.S. Fish and Wildlife Service (Jul. 15, 2019), https://www.globalindigenouscouncil.com/_files/ugd/13fe3b_551251ad8fc54e46a465ae2842797957.pdf.

257. 2020 Rule, *supra* note 252, at 69889.

258. ATKINS N. AM., SUMMARY REPORT OF INDEPENDENT PEER REVIEW FOR THE U.S. FISH AND WILDLIFE SERVICE GRAY WOLF DELISTING REVIEW 125 (2019).

259. *See* Complaint, *Defs. of Wildlife v. U.S. Fish and Wildlife Service*, No. 3:21-cv-344, 2022 WL 499838 (N.D. Cal. Feb. 10, 2022).

260. *See id.*

261. CTR. FOR BIOLOGICAL DIVERSITY & HUMANE SOCIETY OF THE U.S., EMERGENCY

B. *The States Step In*

In the absence of federal protection, states have stepped into their roles as managers of the Northern Rocky Mountain wolf. Their strategies have proven controversial. In Idaho, new legislation allows trappers and contractors to kill close to 90 percent of the state's wolf population using methods that were previously disallowed.²⁶² The Montana legislature passed a number of bills that allow for unlimited killing of wolves so long as the total population is sufficient to support fifteen breeding pairs.²⁶³ The bills also extend the hunting season and allow for a number of highly effective methods of hunting that were previously illegal, providing reimbursement for costs incurred in hunting or trapping wolves.²⁶⁴ In new laws in Wyoming, in over 80 percent of the state, no restrictions exist on the number of wolves taken, the means of killing or trapping, or requirements to obtain a permit.²⁶⁵

As a result, hunters are killing Northern Rocky Mountain wolves at unprecedented rates. In the 2021 season, for example, "hunters killed more Yellowstone wolves that left the park's borders . . . than any season since the animal was reintroduced to the region in 1995."²⁶⁶ By the end of the season, which also marked Yellowstone National Park's 150th anniversary, one third of the park's wolves had been killed.²⁶⁷ In 2021, hunters killed three members of one of Yellowstone's iconic packs, the Junction Butte pack, after they wandered outside the park's boundaries.²⁶⁸ Additionally, one of Yellowstone's packs, the Phantom Lake pack, was completely eliminated and another was put at risk after its alpha female was killed just before the breeding season.²⁶⁹ The rate of

PETITION TO RELIST GRAY WOLVES (*CANIS LUPUS*) IN THE NORTHERN ROCKY MOUNTAINS AS AN ENDANGERED OR THREATENED "DISTINCT POPULATION SEGMENT" UNDER THE ENDANGERED SPECIES ACT 1-30 (2021), https://www.biologicaldiversity.org/campaigns/gray_wolves/pdfs/Gray-Wolf-Relisting-Petition-5-25-2021-w-App-A.pdf [<https://perma.cc/BD2L-SL7R>] [hereinafter CBD PETITION]; Michael Doyle, *Indigenous Activists Seek High-Level Help for Gray Wolf Push*, GREENWIRE (Oct. 27, 2021), <https://www.eenews.net/articles/indigenous-activists-seek-high-level-help-for-gray-wolf-push> [<https://perma.cc/GFZ6-SKIJ>].

262. CBD PETITION, *supra* note 261, at 16.

263. *Id.*

264. *Id.*

265. *Id.* at 17.

266. Kyle Dunphey, *More Yellowstone Wolves Killed This Season than Any Since the Species was Reintroduced in 1995*, DESERET NEWS (Jan. 10, 2022), <https://www.ksl.com/article/50324984/more-yellowstone-wolves-killed-this-season-than-any-since-the-species-was-reintroduced-in-1995> [<https://perma.cc/CP7A-VGG5>].

267. Joshua Partlow, *'Unprecedented Killing': The Deadliest Season for Yellowstone's Wolves*, WASH. POST (Mar. 4, 2022), <https://www.washingtonpost.com/climate-environment/2022/03/04/yellowstone-wolves-hunting> [<https://perma.cc/N5L9-GA7H>].

268. Ellen Fike, *Three Yellowstone Wolves Killed During First Week of Montana Hunting Season*, COWBOY STATE DAILY (Sept. 27, 2021), <https://cowboystatedaily.com/2021/09/27/three-yellowstone-wolves-killed-during-first-week-of-montana-hunting-season> [<https://perma.cc/MD7Q-6YEN>].

269. Partlow, *supra* note 267.

wolves being killed was so high that Montana cut its hunting season short after twenty-three wolves from Yellowstone Park were killed, a rare reversal of permissive wolf slaughter.²⁷⁰

Although other wolf populations are currently listed as endangered following the vacatur of the 2020 Rule, during the brief period that they were only managed at the state level, hunters killed wolves outside the Northern Rocky Mountains at shocking rates. In Wisconsin, in the weeks following the 2020 Rule removing ESA protections from gray wolves, hunters killed over 200 wolves in just sixty hours, far exceeding the season quota of 119.²⁷¹ Nevertheless, some state representatives are already pushing for delisting the now-protected wolves.²⁷² Other states, along with several Tribes have opposed such a bill.²⁷³

Despite the setbacks, the recovery of the Northern Rocky Mountain wolf is—or at least, has been—in many ways, a success. Once on the brink of extinction in the United States, gray wolves are now reestablished in parts of their historical range. However, this forces us to question what recovery means biologically and thus legally. While in some areas, wolves may be considered “recovered,” gray wolves remain functionally extinct throughout over 90 percent of their historical range.²⁷⁴

III. AN ENDANGERED SPECIES LIKE NO OTHER

If the preceding story seems convoluted and complex, that’s because it is. Wolves alone star in this unusually political conservation drama. The ESA requires that agencies apply the “best scientific and commercial data available” when listing and protecting endangered species, yet wolf management has strayed significantly from that mandate.²⁷⁵ In the following Subparts, we identify some of the predominant characteristics of this divergence.

To be sure, the gray wolf is not the only species that faces politically charged and lengthy journeys under the ESA. In many ways the story of

270. Associated Press, *Mont. Curbs Wolf Hunt After 23 from Yellowstone Killed*, GREENWIRE (Jan. 31, 2022), <https://subscriber.politicopro.com/article/eenews/2022/01/31/mont-curbs-wolf-hunt-after-23-from-yellowstone-killed-ee-00003615> [https://perma.cc/3727-63XM].

271. Richard, *supra* note 47; Kim Heacox, *America Is Exterminating its Wolves. When Will this Stop?*, GUARDIAN (May 4, 2022), <https://www.theguardian.com/commentisfree/2022/may/04/america-is-extermimating-its-wolves-when-will-this-stop> [https://perma.cc/JC5L-LF9A].

272. Larry Lee, *New Legislation Attempts to Remove Wolves From Endangered Species List*, BROWNFIELD (May 18, 2022), <https://brownfieldagnews.com/news/new-legislation-attempts-to-remove-wolves-from-endangered-species-list> [https://perma.cc/MS9G-8CCA].

273. *Petition opposing bill to delist gray wolves in Wisconsin*, RECOGNIZED BANDS OF OJIBWE (Apr. 26, 2022), https://www.wpr.org/sites/default/files/2022-04-26_letter_re_s_3738_wolf_legislation.pdf [https://perma.cc/ZWU8-8LB3] (Petition from tribes opposing bill to delist gray wolves in Wisconsin).

274. *Humane Soc’y of the U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017).

275. 16 U.S.C. § 1533(a)(3)(b).

the gray wolf parallels that of the grizzly bear in Yellowstone National Park. Like gray wolves, grizzly bears once roamed most of western North America until humans almost completely eradicated them.²⁷⁶ Unlike with gray wolves, even after humans had extirpated most grizzly populations, a population of approximately 300, naturally occurring grizzly bears remained in Yellowstone National Park.²⁷⁷ Notwithstanding their similarities, recovery and management of grizzlies followed a more predictable and less chaotic path compared to that of the wolves.

Following the enactment of the ESA, the Service listed grizzly bears as a threatened species in 1975.²⁷⁸ In 1985, agencies began to work to control grizzly bear mortality and published the first Grizzly Bear Recovery Plan.²⁷⁹ They created another recovery plan in 1993 and outlined the recovery criteria for delisting the Yellowstone grizzly.²⁸⁰ Additionally, the Service planned to reintroduce the grizzly, like the gray wolf, to its historic habitat through Section 10(j). The Service attempted, although ultimately abandoned, reintroduction efforts for the grizzly bear.²⁸¹ By the early 2000s, the grizzly population had grown to over 500 bears, and they occupied a large portion of habitat outside the designated recovery zone.²⁸² The Service also applied the strategy of simultaneously creating and delisting DPSs to grizzly bears.²⁸³

276. Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List as Endangered the Yellowstone Distinct Population Segment of Grizzly Bears, 72 Fed. Reg. 14866 (Mar. 29, 2007) (codified at 50 C.F.R. pt. 17) [hereinafter Grizzly Rule]. By the 1930s, approximately 125 years after the first contact with humans, grizzly populations had been reduced to less than 2 percent of their historic numbers and range. *Id.* at 14868.

277. *Id.* at 14869.

278. *Id.*

279. U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY: YELLOWSTONE. MOUNTAIN-PRAIRIE REGION, ENDANGERED SPECIES PROGRAM (2005) <https://www.nrc.gov/docs/ML1017/ML101790297.pdf> [<https://perma.cc/75P5-2JLU>].

280. Grizzly Rule, *supra* note 276, at 14871.

281. In 2000, the Service created a nonessential experimental population in an attempt to reintroduce grizzlies to the Bitterroot area of Idaho and Montana. Ultimately the Service abandoned the reintroduction plan and grizzly bears were not reintroduced into the Bitterroot area; *see* Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 65 Fed. Reg. 69624 (Nov. 17, 2000) (codified at 50 C.F.R. pt. 17). The area was considered uninhabited by grizzlies until recently when, in 2021, a collared bear wandered into the Bitterroot area; *see* Nick Mott, *Bitterroot Grizzlies Will Have Full ESA Protections, Wildlife Officials Say*, MONT. PUB. RADIO (Jan. 24, 2020), <https://www.mtpr.org/montana-news/2020-01-24/bitterroot-grizzlies-will-have-full-esa-protections-wildlife-officials-say> [<https://perma.cc/X6XA-GF42>].

282. Grizzly Rule, *supra* note 276, at 14869.

283. In 2007, in a move that paralleled similar efforts to delist gray wolves, the Service designated the Yellowstone population of grizzly bears as a DPS and simultaneously delisted it. *See generally id.* This move did not survive judicial review, however, and grizzlies were relisted shortly after. *See* Greater Yellowstone Coalition, Inc. v. Servheen, 672 F. Supp. 2d

Ultimately, gray wolf management sharply diverged from that of grizzly bears: conservation of grizzlies was driven primarily by the needs of grizzlies, not those of humans; politics was far less of a driving force in shaping management practices; and grizzly populations were not cut, drawn, and moved like chess pieces. Of course, when the needs of people bump up against the needs of the nonhuman world, political calculations shape how the best available science will be employed.²⁸⁴ But, as we show throughout this article, there's no politics like wolf politics.

A. *Political Conservation*

The history of gray wolf management illustrates how politics eclipses biology when the Service manages wolves. Specifically, it frequently appears that political expedience, not the needs of the species, drives decision-making in wolf management. As a result, wolf law has evolved to be a creature of these political pressures with a number of distinct characteristics. Wolf population management has continuously morphed, both in terms of geographic and taxonomic classifications, resulting in constantly changing definitions of species, populations, and population segments. This, in turn, sets in motion a pendulum oscillating between listing and delisting wolf populations.

While the ESA has allowed for the recovery of wolves in many areas, it has also led to an intense focus on delisting as a primary goal for recovery.²⁸⁵ As a result, Service officials attempt to delist wolves rather than try to create robust wolf populations.²⁸⁶ While wolves might sometimes meet the criteria for removal from ESA protections based on their current range, they could benefit from more vigorous local management programs, and especially, from an expanded range.²⁸⁷ Nonetheless, advocates in Wyoming and the Western Great Lakes have pushed relentlessly to delist these populations of gray wolves.²⁸⁸ In both cases, the wolves met recovery criteria in their current range, but only occupied small fractions of their historical range.²⁸⁹ Many subspecies of wolf no longer face acute threats of extinction, but full recovery requires us to decide what portion of their historic range wolves should occupy to guarantee

1105 (D. Mont. 2009) *order clarified*, No. CV 07–134-M-DWM) 2009 WL 10677467 (D. Mont., Nov. 17, 2009), and *aff'd in part, rev'd in part and remanded*, 665 F.3d 1015 (9th Cir. 2011). The Service removed ESA protections from the Grizzlies again in 2017 but was unsuccessful. See *Crow Indian Tribe v. United States*, 343 F.Supp.3d 999 (D. Mont. 2018), *aff'd in part, remanded in part*, 965 F.3d 662 (9th Cir. 2020).

284. While this Article focuses on the Northern Rocky Mountain gray wolf, this “political conservation” extends beyond this population. See, e.g., Edward A. Fitzgerald, *The Lobo Limp on from Limbo: A History, Summary, and Outlook for Mexican Wolf Recovery in the American Southwest*, 29 COLO. NAT. RESOURCES, ENERGY & ENV'T L. REV. 223 (2018).

285. See Williams, *supra* note 27, at 152.

286. *Id.* at 111.

287. *Id.* at 150.

288. *Id.*

289. *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017).

long-term species survival. Opponents of wolves would like to circumscribe that range as tightly as possible.

Unfortunately, the focus on delisting local wolf populations distracts from the more challenging conversation of how to effectively conserve the species in the long run as the ESA requires.²⁹⁰ In recent rulemaking, the Service claimed to rely on the best scientific data even when its own peer-reviewers cast doubt on its conclusions. For example, the Service accepted Wyoming's wolf management plan in the 2012 Rule, notwithstanding peer-reviewers finding that "[Wyoming's] Plan, as written, does not do an adequate job of explaining how wolf populations will be maintained, and how recovery will be maintained."²⁹¹ A peer reviewer of the 2020 Rule similarly pointed out the questionable steps the Service took to reach its conclusion: "In order to advance a novel minimalist interpretation of the ESA, the rule is forced into numerous factual misinterpretations and omissions regarding wolf demography and genetics, as well as unexplained inconsistencies with previous rulemaking."²⁹²

Such "minimalist interpretations" derive from political convenience, not from the reality of a large mammal known to travel many miles, and have shaped the Service's interpretation of the ESA as it reintroduces wolf populations. Even before gray wolves were reintroduced into the Northern Rockies, the 1987 Recovery Plan rested on wishful thinking and dubious assumptions that peripatetic wolves would just stay put.²⁹³ Efforts to reintroduce the wolf rested on the unpersuasive assumption that new wolf populations would not overlap with other populations.

As a result, the Service's definition of "population"²⁹⁴ ensured that individuals of different populations could overlap without violating the requirements of Section 10(j). The Service assumed that wolves would achieve sufficient recovery to warrant delisting before overlap became a problem.²⁹⁵ This

290. Williams, *supra* note 27, at 151.

291. ATKINS, FINAL WYOMING GRAY WOLF PEER REVIEW PANEL SUMMARY REPORT 13 (Doc. No. FWS-R6-ES-2011-0039-1383, Jan. 3, 2012).

292. ATKINS SUMMARY, *supra* note 109. Ultimately, "The United States Fish and Wildlife Service, the environmental trustee in charge of endangered species recovery, has employed an extreme and risky minimalist approach in a designation of its demographic 'recovery' goal Arguably, it [] reflects unconstrained and politically motivated 'adaptive management' rather than a commitment to employing the best available science and data in the realm of conservation science." Valerie Bittner, *Wolves in the Crosshairs: A Scientific Case Against the Final Rule of the U.S. Fish and Wildlife Service Removing Northern Rocky Mountain Gray Wolves from the Endangered Species List*, 15 HASTINGS W.-N.W. J. ENV'T L. & POL'Y 281, 321-22 (2009).

293. See generally 1987 RECOVERY PLAN, *supra* note 72 (detailing reasoning underlying recovery efforts).

294. U.S. FISH & WILDLIFE SERV., THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO, ENVIRONMENTAL IMPACT STATEMENT 2-6 (1993) ("[A]t least two breeding pairs of gray wolves that each successfully raise at least two young to December 31 of their birth year for 2 consecutive years.").

295. See, e.g., Cheever, *supra* note 96.

approach did not reflect the reality that wolves regularly travel great distances and would not recognize or respect the boundaries defined by the Service. Indeed, Congress contemplated this result when it added the 10(j) rule to the ESA in 1982:

Thus, for example, in the case of the introduction of individuals of a listed fish species into a portion of a stream where the same species already occurs, the introduced specimens would not be treated as an “experimental population” separate from the non-introduced specimens The Committee intends, however, that such a population be treated as experimental only when the times of geographic separation are reasonably predictable and not when separation occurs as a result of random and unpredictable events.²⁹⁶

As Fred Cheever expressed it, Congress may have been mistaken in “applying a flawed perception of nature” and “a static notion of biology” to create this requirement.²⁹⁷ Or, they knew what they were doing, responded to political pressures, and hoped for the best, figuring hapless Service personnel would deal with it down the line. Nevertheless, the Service largely sidestepped this requirement by defining “population” in such a way that excluded most naturally occurring wolves. While the Service’s interpretation of this requirement has been subject to repeated judicial review, it still underpins gray wolf recovery efforts.

The combined effect of these interpretations is that the Service has provided piecemeal protections of the ESA to wolves. Beginning in 1978, when the Service listed Minnesota gray wolves as a threatened species, separate from endangered gray wolves in the remaining states, politics has driven classifications of wolf populations. In that case, the Service responded to political pressure from Minnesota to not classify wolves in the state as endangered. Although the reason for reconsidering gray wolf classifications throughout the country was that wolves did not respect state boundaries, the 1978 Rule made a mockery of this issue by classifying Minnesota wolves as a separate population. Furthermore, commenters on the rule raised concerns that differentiating between the two species was purely in response to political pressure from Minnesota.²⁹⁸ The Service strongly denied these accusations and emphasized that it was not “giving in, but rather that an accurate classification and proper regulations are being established.”²⁹⁹ A fair reading of the 1978 Rule casts doubt on this, seeing that only minor differences exist between listing factors for the two species.³⁰⁰

The Service’s hopes were little more than wishful thinking driven by political pressure. Within four years of reintroducing wolves into the Northern

296. H.R. Rep. No. 97-567, pt. 1 (1982).

297. Cheever, *supra* note 96, at 294.

298. 1978 Rule, *supra* note 65, at 9609.

299. *Id.*

300. See 1978 Rule, *supra* note 65.

Rocky Mountains, a lone female flaunted her designated experimental population area and made for Oregon.³⁰¹ She demonstrated the flaws in the Service's assumption that wolves would respect the boundaries set out in regulation. Instead of accepting this reality, the Service opted to capture and return the peripatetic wolf to Idaho.³⁰² The wolves did not change their wandering habits and continue to defy the legal boundaries that have been set for them. Just a few years later, in 2003, the Rocky Mountain Wolf Recovery report detailed several packs that had formed over an increasing range.³⁰³ Unsurprisingly, as wolves recovered, they continued to form new packs and expand their range—which one would think would meet the ESA's goals—despite the Service's regulatory manipulations. Not only did the wolves not stay put, as the Service hoped they would, but those that wandered outside their defined recovery areas occasionally did so in pairs or small packs, further challenging the Service's notion of a "population."³⁰⁴ California, from whence wolves had completely disappeared, now hosts three fecund wolf packs.³⁰⁵ In California, the moment a wandering wolf crossed the border south from Oregon, the Center for Biological Diversity successfully petitioned for protections under the State's own Endangered Species Act.³⁰⁶

In working with Montana, Wyoming, and Idaho, the Service demonstrated that biological reality does not draw the Service's DPS lines. Creating a DPS for the purpose of delisting it, for example, seemed to be more a means of transferring management and avoiding political brouhahas than demarcating between biologically distinct populations with different ecological needs.³⁰⁷

The delisting efforts from 2003–2009 further highlight the ways that political motivations shape wolf management. The Service was intent on returning management to the states, at least partially because federal management was politically unpopular in states where wolves roamed or were reintroduced.³⁰⁸ The Service largely failed in the legal battles that ensued

301. Cheever, *supra* note 96 at 350; Press Release, U.S. Fish & Wildlife Serv., Wolf Returned to Idaho (Mar. 26, 1999).

302. Cheever, *supra* note 96; *see also* Press Release, U.S. Fish & Wildlife Serv., Wolf Returned to Idaho (Mar. 26, 1999).

303. 2003 Report, *supra* note 196, at 10–13.

304. CBD Petition, *supra* note 261, at 5 (citations omitted).

305. Richard, *supra* note 47, at 8.; Kurtis Alexander, *California Wolf Pack Produces State's Largest Litter of Pups in a Century*. SF Chron, Nov. 29, 2022, <https://www.sfchronicle.com/bayarea/article/California-wolf-pack-produces-state-s-largest-17619464.php>.

306. Press Release, Earthjustice, Gray Wolves Will Keep California Endangered Species Protection (Jan. 28, 2019), <https://earthjustice.org/news/press/2019/gray-wolves-will-keep-california-endangered-species-protection> [<https://perma.cc/E93V-XYZL>].

307. Humane Soc'y of U.S. v. Kempthorne, 579 F. Supp. 2d 7, 14 (D.D.C. 2008) (The Service could not create a DPS "for the sole purpose of delisting that species").

308. *See* Richard, *supra* note 47, at 8 ("The wolf is a surrogate for people's hatred against government intervention because they've been protected. People see protecting wolves as a symbol of everything they hate about the government telling them what they can and can't do."). *Id.*

because the proposed plans were out of touch with the species' needs in ways that even a judge who had never taken an Environmental Law course could see.³⁰⁹ Before Congress intervened and precluded judicial review, courts identified that politics, more than statutory mandates or wolf biology, drove the Service's proposed solutions.³¹⁰

For the wolves, political conservation along with the focus on delisting has resulted in oscillating protection under the ESA that severely limits recovery.³¹¹ This pendulum swings depending on prevailing political pressures or courtroom wins from environmentalists, ranchers, property rights advocates, and states' rights advocates. When we mix public fear of and antipathy towards wolves with major changes in protection status and inconsistent management authority, the result is ineffective management, which erodes local support for wolves and ultimately leads to increased wolf kills.³¹²

Federal ESA protections protect wolves in the short term by preventing wolf hunts.³¹³ In the long term, however, a lack of local participation in wolf management can make local groups feel disempowered in wolf management, which in turn leads to increased antipathy towards wolves.³¹⁴ Additionally, many rural communities that interact most frequently with wolves distrust the federal government.³¹⁵ Rural communities bear the brunt of the costs of wolf conservation through predated livestock and restricted land use and often distrust federal management of large areas of land.³¹⁶ As a result, it is more difficult to enforce existing conservation laws and to gain the support of rural elected officials in creating and enforcing policy.³¹⁷ This underscores the importance of seeking and building local support when designing wolf conservation programs. Not only does enlisting local stakeholders make it easier to enforce conservation rules, but it can allow for longer term conservation of the species by improving local attitudes towards wolves.

Thus, devolving some wolf management to the states sometimes makes sense, if done cautiously. Unfortunately, the sudden shifts from federal protections to local management also lead to shocks in the wolf population. The absence of an intermediate step between full federal protection for wolves

309. See *supra*, Part III (Discussing history of wolf management in those years).

310. *Defs. of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1228 (D. Mont. 2010) (“Even if the Service’s solution is pragmatic, or even practical, it is at its heart a political solution that does not comply with the ESA.”).

311. Erik Olson et al., *Pendulum Swings in Wolf Management Led to Conflict, Illegal Kills, and a Legislated Wolf Hunt*, 8(5) SOC’Y FOR CONSERVATION BIOLOGY: CONSERVATION LETTERS 351 (2015).

312. *Id.*

313. *Id.*

314. *Id.*

315. Holly Firlein, *Continental Divides: How Wolf Conservation in the United States and Europe Impacts Rural Attitudes*, 45 *ECOLOGY L. Q.* 327 (2018).

316. *Id.* at 331.

317. *Id.* at 331, 340.

under the ESA and full state management leads to dramatic swings in management practices. Some iconic species, including wolves, may benefit from a middle category where they have recovered enough to thrive locally, while not yet restored to anywhere close to their historic range.³¹⁸ They no longer confront acute threats of extinction, but do face challenges progressing through the delisting process.³¹⁹ An intermediate category of protection would help alleviate this tension.³²⁰

B. *Minimizing Human Conflict as Recovery Strategy*

Another striking aspect of the story of the recovery, or lack thereof, of the gray wolf is the way it has been tailored to minimize conflicts with humans. The ESA provides broad discretion to the Service in how it protects species. At the ESA's core, however, remain clear and seemingly straightforward mandates: the value of preserving species is vast; listing decisions must be made based on science, not politics; intentional killing of protected species should be allowed only in limited circumstances; and the Service has an obligation to recover species to an extent that the species no longer needs protection.

While impacts of wolves on ranchers are frequently cited as the source of tailoring wolf recovery to human acceptance, the fact that wolves are responsible for a small fraction of livestock deaths suggests other motives besides merely reducing livestock deaths.³²¹ A core tenet of wolf recovery strategy has been minimizing conflicts with humans. The Service claims that wolf depredations of livestock drive this intolerance of wolves; wolves cause immense inconvenience and economic cost to ranchers and farmers who share their habitat.³²² The data suggest otherwise: wolves cause only a small share of livestock fatalities.³²³

Since the Service first listed the gray wolf under the ESA, it has predicated the species' recovery on how much citizens are willing to accept and tolerate wolves. The Service incorporated this approach into listing and delisting decisions, which cite "human attitudes toward the gray wolf" as an "other or manmade factor affecting its continued existence."³²⁴ The 1978 Rule, for

318. *Id.*

319. *Id.*

320. For further discussion, *see id.*

321. Dubuc, *supra* note 206, at 283 ("Because ranching is such an integral part of the NRM culture, the ranching community has a disproportionate amount of political clout in relationship to the industry's economic impacts . . . That makes it understandable why, with ranchers adamantly opposed to the presence of wolves, a sparsely populated rancher-friendly state like Wyoming would push the envelope in resisting wolf reintroduction.").

322. *See, e.g.*, 2020 Rule, *supra* note 252, at 69794.

323. *Government data confirms that wolves have a negligible effect on U.S. cattle & sheep industries*, HUMANE SOC'Y OF THE U.S. 2-4 (Mar. 6, 2019), https://www.humanesociety.org/sites/default/files/docs/HSUS-Wolf-Livestock-6.Mar_.19Final.pdf [<https://perma.cc/BPX6-85PB>].

324. *See* 2008 Final Rule, *supra* note 217, at 10552 ("An important determinant of the

example, allowed lawful killing of wolves in self-defense and in defense of livestock to “ameliorate present conflict between wolf and human interests.” By naming human intolerance as a primary threat and reason for listing, the Service could then shape recovery efforts around reducing this conflict. This logic seems straightforward: if humans could not be placated, they would continue to kill wolves in large numbers. Thus, appeasing humans would benefit wolves. This approach has led to contradictory recovery methods.

In 1980, the first recovery plan for the Northern Rocky Mountain wolf incorporated this approach. The plan identified reducing human-caused mortality as one of its primary goals³²⁵ and began to shape recovery to human—and not wolf—needs. For example, the plan limited wolf reintroduction to areas that were “socially sound,” that is, those that would have limited impact on human activity and “minimal conflict with existing land uses.”³²⁶ While this may be a reasonable approach, it remains at odds with the statutory mandates of the ESA, which require the best available science as the lodestar in bringing species back from the brink of extinction.³²⁷

Even more explicitly, later listing and delisting rules promulgated by the Service claimed that delisting wolves and increasing the scope of legal kills would ameliorate a primary threat to the species’ existence, i.e. human negative attitudes towards wolves.³²⁸ Nevertheless, it is not clear that reducing protections improves human attitudes towards wolves.³²⁹ The conclusion that reducing protections betters the species by improving human attitudes rests on shaky ground. The Service itself even noted in its most recent delisting rule

long-term status of gray wolf populations in the U.S. will be human attitudes toward this large predator.”); 2009 Rule, *supra* note 224, at 15175 (same); 2012 Rule, *supra* note 47, at 55591 (same). The 1978 Rule did not cite human attitudes as a listing factor but rather focused on human killings as “overutilization.” 1978 Rule, *supra* note 65, at 9611.

325. 1980 RECOVERY PLAN, *supra* note 72, at 13.

326. *Id.* at 21.

327. The gray wolf is certainly not the only species whose management is influenced by reducing conflicts with humans. However, it is unique in its pervasiveness and the extent to which such thinking influences every aspect of wolf recovery and management.

328. 2012 Rule, *supra* note 47, at 55592 (“We conclude that public tolerance of wolves will improve as wolves are delisted, local residents begin to play a role in managing wolf populations, and hunters start to see wolves as a trophy animal with value.”).

329. European and settler animosity towards wolves can be traced back to fairy tales and fables. See, e.g., Meb W. Anderson, Comment, *Federal Delisting of the Gray Wolf: An Oregon Perspective on the Future of Gray Wolf Recovery Under State Endangered Species Acts*, 6 VT. J. ENV'T L. 133 (2004); Daniel R. Dinger, *Throwing Canis Lupus to the Wolves: United States v. McKittrick and the Existence of the Yellowstone and Central Idaho Experimental Wolf Populations Under A Flawed Provision of the Endangered Species Act*, 2000 BYU L. REV. 377, 384 (2000). This perception of wolves is not universal, however, as many indigenous people looked favorably upon wolves. See Anderson, *supra*, at 136 (“Historically, Native North Americans ‘looked . . . favorably upon wolves.’ In fact, the mania for wolf control brought on by early European settlers ‘appears to be an aberration, a temporary sickness that afflicted only some [humans] and which even some of the most avid wolf hunters came to regret.’”) (quoting PETER STEINHART, *THE COMPANY OF WOLVES* 30 (1995)) PetPETER STEIN.

that despite reducing protections, “[s]urveys have indicated that . . . negative attitudes about wolves persist and overall tolerance for wolves remains low,” and “[s]trong emotions and divergent viewpoints about wolves and wolf management will continue regardless of the Federal status of the species.”³³⁰ Taking this logic to the extreme, if federal protection of species upsets humans and thereby threatens a species, perhaps the ESA should not require that we protect any species at all?

From the outset, the Service acknowledged that wolves would need to be killed in some circumstances. While at first this was limited to controlling “problematic” wolves that attacked livestock, it foreshadowed permitting hunting and trapping of wolves simply to appease human desires. This flexible approach was only possible because the gray wolf was reintroduced as an experimental population. The rules introduced as part of the 2003 Rule loosened the restrictions on removing depredating wolves.³³¹ Recent reports of employees of other government agencies rubber-stamping claims of wolf depredation cast doubt on this strategy as a whole.³³² The scope of permissible killings has only increased since then: states now allow hundreds of wolves to be slaughtered in one season’s spree.

The grizzly bear, another charismatic species that conflicts with humans, has not faced such a severe response. While early grizzly recovery plans acknowledged that conflict with humans may necessitate killing bears, it was permitted in far more limited circumstances than as with wolves.³³³ Moreover, although the early recovery plans allowed direct killing of grizzlies that was determined to be necessary (self-defense, livestock depredation, etc.) the plans circumscribed this by identifying a mortality rate that would permit recovery.³³⁴

Wolf recovery, on the other hand, is shaped primarily by the need to shoehorn wolves to fit human needs. Wolf recovery plans have gone as far as stating that “recovery of the wolf, whether through natural reestablishment or translocation, cannot succeed without public support and acceptance.”³³⁵ Instead of asking how human activities could be made to harmonize with the species’ requirements, the Service frames recovery around fitting wolf needs to existing human activities and land use.³³⁶ The cumulative effect of which

330. 2020 Rule, *supra* note 252, at 69812.

331. See generally 2003 Rule, *supra* note 61 (loosening restrictions on taking depredating wolves).

332. See Spencer Roberts, *Cry Wolf*, THE INTERCEPT (May 24, 2022), <https://theintercept.com/2022/05/24/mexican-gray-wolf-endangered-wildlife-services-fraud> [<https://perma.cc/76CU-RLCQ>] (showing how farmers falsify reports of wolves attacking livestock and FWS employees sign off on them).

333. See U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY PLAN 1, 47 (Sept. 10, 1993) [hereinafter GRIZZLY RECOVERY PLAN].

334. *Id.* at 47. The recovery plan specifically identified that mortality could not exceed four percent and that no more than 30 percent of that mortality could be female bears. *Id.*

335. 1987 RECOVERY PLAN, *supra* note 48, at 9.

336. See 2012 Rule, *supra* note 47, at 55592 (“Wolf conservation can be successful even in

leads to a system in which outright hunting of large numbers of individuals of a species is somehow consistent with recovering that species.³³⁷ This thinking is an exception, and far from the rule, for species conservation under the ESA. Although human needs do shape other species' recovery plans, the gray wolf remains an outlier. Recovery plans for grizzlies, which have similar conflicts with humans—most notably livestock depredations—were still driven by the species' needs. The grizzly recovery plan instructed that human activities, including livestock grazing, timber harvesting, mining, and recreation, be made “compatible with grizzly bear habitat requirements.”³³⁸ These requirements are driven primarily by the requirements of the species, and only later adapted to human needs.³³⁹

Thus, politics and human convenience drive even those parts of the ESA that science alone is supposed to guide. The ESA is clear that officials may not consider economic impacts when they make listing decisions.³⁴⁰ What is human acceptance if not minimizing economic costs to ranchers?³⁴¹ Although not explicit, the notion that wolf recovery can be driven by human acceptance—minimizing conflicts between humans and wolves—smuggles economic costs into the analysis. Nevertheless, politics—and the economic costs that drive politics—have influenced decisions to list and delist gray wolves.

C. *Cooperative Federalism for a Species That Wanders*

When Congress passed the Endangered Species Act, cooperative federalism arrangements were de rigeur for many environmental laws. The Clean Air Act, for example, sets out an ambitious framework that allows states to work with federal agencies to improve air quality across the country. Similarly,

areas with relatively high human density, *if management policies factor- in human concerns.*") (emphasis added) (citations omitted).

337. For politically explosive species, the 10(j) rule has emerged as the primary route for recovery through reintroduction, and states have been given an oversized role in implementing the 10(j) rule. While increased management flexibility may, in theory, diffuse backlash from reintroduction, the use of the 10(j) rule has become so pervasive that it requires a more comprehensive review.

338. GRIZZLY RECOVERY PLAN, *supra* note 333, at 35.

339. For example: “Wolf recovery areas should not be superimposed over major livestock-producing areas, and provision should be established for controlling problem wolves. Development and implementation of wolf management zones and a specific wolf control plan are necessary elements for wolf recovery in the Northern Rocky Mountain.” 1987 RECOVERY PLAN, *supra* note 48, at 9.

340. 16 U.S.C. § 1533(b)(1)(A); H.R. Rep. No. 97–835, at 20 (1982), *reprinted in* 1982 U.S.C.A.N. 2807, 2861.

341. See Nicholas J. Podsiadly, *Howl of the Wolf or Bark of the Bureaucrat? The Endangered Species Act, the Future of North American Wolf Reintroduction Efforts and the Dilemma of Delisting*, 9 DRAKE J. AGRIC. L. 123, 126 (2004) (comparing the minimal impact of reintroducing whooping cranes with “the vast majority of western cattle ranchers who stand to lose their economic livelihood if their herds of livestock are attacked and decimated by wolves while grazing on federal lands.”).

the Clean Water Act relies heavily on federal partnership with states to reduce pollution. The ESA, on the other hand, was an anomaly in that it was not predicated on extensive cooperation with states. With the exception of Section 6, which requires the Service to “cooperate to the maximum extent practicable with the States” in carrying out the ESA, the rest of the ESA grants most decision-making authority to the federal government.³⁴²

Why is the ESA an outlier in this regard? Some suggest that the ESA was intended to be implemented through cooperative federalism but, in its implementation, has deviated from this original purpose.³⁴³ Others argue that the ESA would simply be more effective if the Service embraced a more prominent role for states in its implementation.³⁴⁴ We can also look to ecological reality: listed species are unfamiliar with state political jurisdictions, and wander indiscriminately, making federal protection the more sensible means for fulfilling the ESA’s goals.

But the Service has aggressively invited the states to help manage the gray wolf. The efforts to delist the Northern Rocky Mountain wolf, starting in 2003, began as a simple exercise in state-federal cooperation. The Service relied on the states to produce management plans that would support their findings that the species no longer needed federal protection. It quickly became apparent that on the other side of the “laboratories of democracy” coin was a disjointed and inconsistent set of state regulations, often meant to undercut wolf protection. Northern Rocky Mountain wolves have been subject to dramatically different protections that change by simply crossing state or park boundaries.

Almost immediately, the courts intervened in this cooperative management plan. Both sides challenged the Service’s final rules. Conservation groups claimed that the rules were too permissive of killing wolves, and Wyoming sued because its management plan had not been approved.³⁴⁵ While

342. 16 U.S.C. § 1531(c)(2); Arha & Thompson, Jr., *supra* note 8, at 5.

343. See, e.g., Nagle, *supra* note 82, at 386 (arguing “that we simply need to recover the original vision of the state role in the ESA. The Congress that enacted the ESA in 1973 expected that states would play a lead in conservation efforts because the states already had substantially more wildlife management expertise than the federal government.”). Some argue that the legislative history of the ESA shows that the ESA was not meant to subvert the role of states in species management. See Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENV’T L. 463 (1999) (illustrating how, at the time of its passage, some politicians viewed cooperative federalism as the cornerstone of the ESA); Robert P. Davison, *The Evolution of Federalism under Section 6 of the Endangered Species Act*, at 111 in *THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT* 3, 111 (Kaush Arha & Barton Thompson, Jr. eds., 2011). Others, however, point out that the ESA does, in fact, leave states free to regulate wildlife above the “floor” set by the ESA. See *id.*

344. See generally Kaush Arha and H. Barton Thompson, Jr., *Toward Greater State and Local Commitment*, in *THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT* 3, 307 (Kaush Arha & Barton Thompson, Jr. eds., 2011).

345. See *supra* p. 36.

judges had always been involved to some degree in managing endangered species, this exchange was rare as it now involved both the Service and state wildlife managers. These battles continued until Congress stepped in and ended the conflict by requiring the Secretary of the Interior to reissue the 2009 Rule—which created, and simultaneously delisted, a DPS of gray wolves—and protected it from judicial review.³⁴⁶

The story of the gray wolf illustrates why, for many species, federal management is more prudent—and more legal, given the clear goals of the ESA—than state control. What has resulted from this experiment is a four-legged cooperative federalism—between states, federal agencies, Congress, and courts—yielding consistently contentious and just plain weird results. At the center of this patchwork of state, judicial, federal, and congressional management, the wolf remains a species that does not recognize the jurisdictional web that has been spun around it. While wolf law has emerged as an often-conflicting set of regulations from multiple stakeholders, the wolves themselves live on, pursued and persecuted, but completely unaware. Perhaps this is why, for most ESA listed species, we have a federally dominated system that recognizes that ecological necessity doesn't stop at the border between Wyoming and Montana.

1. States

As compared to their role managing other species, states have played an outsized role in helping—or hurting—wolves on their path to recovery. Although the ESA has largely been implemented from the top down, some provisions allow for—and even encourage—state participation.³⁴⁷ For example, the Service has declined to list a number of species as endangered because state conservation plans suffice.³⁴⁸ Some of these include the Washington ground squirrel, the leopard frog in the Southwest, and the Coral Pink Sands Dunes tiger beetle.³⁴⁹

The ESA also encourages other forms of state and local participation. Under Section 10(a)(1), the Service has used Candidate Conservation Agreements (CCAs) to provide protection for candidate species.³⁵⁰ These agreements allow for states and landowners to avoid additional land-use restrictions if a species is later listed.³⁵¹ Safe Harbor Agreements allow landowners to avoid

346. See *supra* p. 40.

347. See Arha & Thompson, Jr., *supra* note 8, at 5.

348. Nagle, *supra* note 82, at 407.

349. *Id.* at 407-08.

350. Somerset Perry, *The Gray Wolf Delisting Rider and State Management Under the Endangered Species Act*, 39 Ecology L. Q. 439, 454 (2012); Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,706, 32,707 (June 17, 1999) (to be codified at 50 C.F.R. pts. 13, 17). But all of these are not necessarily state-involved—private landowners use these.

351. Perry, *supra* note 350, at 454; 16 U.S.C. § 1539(a)(1)(A); Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. at 32,707.

future land use restrictions by restoring habitat on their property.³⁵² Similarly, Habitat Conservation Plans (HCPs) allow landowners to take listed species as long as they provide measures to conserve a species' habitat and thus compensate for the take.³⁵³ California's Natural Community Conservation Planning (NCCP) program serves as a model for state involvement for achieving the goals of the ESA. Although modeled after HCPs in the ESA, the NCCP Act took a more comprehensive approach to species conservation.³⁵⁴

Finally, both Section 4(d) rules and Section 6 funding agreements allow states to participate in species management. Section 4(d) rules are only available for threatened species and are promulgated at the discretion of the Secretary. These rules are sometimes used to allow flexibility outside of the Section 9 take prohibitions while still protecting a species.³⁵⁵ Section 6 "Cooperative Agreements" explicitly encourages states to participate in implementing the ESA.³⁵⁶ These agreements are typically used to fund grants to states pursuing conservation actions. Nevertheless, they have occasionally been used to give states increased management authority in carrying out wildlife recovery by implementing FWS regulations—stopping short of allowing states to promulgate their own rules.³⁵⁷

Notwithstanding these existing opportunities for cooperative federalism, some suggest that the ESA fails to fulfill its potential by denying states an increased management role.³⁵⁸ Because states traditionally managed wildlife, and other environmental statutes rely on cooperative federalism, some advocate that states play a greater role in implementing the ESA.³⁵⁹ Still, it may be prudent to question state "expertise" considering that wolves were originally brought to the brink of extinction under state management. We would concur that if states were genuinely committed to achieving the object and purpose

352. Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. at 32,707.

353. 16 U.S.C. § 1539(a)(1)–(2); *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*, U.S. DEP'T OF THE INTERIOR FISH & WILDLIFE SERV., 1–7 (2016), <https://www.fws.gov/sites/default/files/documents/habitat-conservation-planning-handbook-entire.pdf>.

354. For a detailed discussion of the NCCP program and the ESA, see Gail L. Presley, *California's Natural Community Conservation Planning Program: Saving Species Habitat amid Rising Development*, in *THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT* 3, 115 (Kaush Arha & Barton H. Thompson, Jr. eds., 2011).

355. Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENV'T L. 45, 93 (2002).

356. 16 U.S.C. § 1535.

357. Perry, *supra* note 350, at 460.

358. See, e.g., Perry, *supra* note 350, at 454; Nagle, *supra* note 82, at 386; Fischman & Hall-Rivera, *supra* note 355.

359. Nagle, *supra* note 82, at 386.

of the ESA, this transition could unleash the “states as ‘laboratories of democracy’ to capture the benefits of policy innovation.”³⁶⁰

The gray wolf provides a glimpse into the potential—for better or worse, but mostly the latter—of such cooperative federalism agreements. In delisting rulemaking under Section 4(a), the Service frequently cites state management plans as sufficient protection for the species to warrant delisting. While states were not technically responsible for the conservation of the Northern gray wolf, the Service could use the adequacy of management plans to negotiate delisting the species. Not all states welcome cooperation with federal agencies with open arms.³⁶¹ It was not until the Service approved Wyoming’s plan that it agreed to delist the wolf in Wyoming along with the neighboring states. Moreover, it is increasingly clear that listing and delisting oscillations are inadvisable because throughout these regulatory shifts, the wolves had no way of knowing when previously safe grounds became hostile. Certainly, some degree of consistency between states is valuable for a species that frequently crosses state lines.³⁶²

Additionally, states played a central role in many policies originally outlined in recovery plans. Critics contend that states are better positioned to maintain political backing for species protections through more local educational and outreach programs.³⁶³ In this way, historic management of the gray wolf is also illuminating. Beginning in the first recovery plan published in 1980, the Service emphasized that states be involved in these types of campaigns.³⁶⁴ In fact, the Service made states the lead agency in many aspects of implementing the plans, including political outreach.³⁶⁵ Nevertheless, in areas with wolf populations, attitudes towards wolves remain largely unchanged, and wolves—the species and its individuals—have paid the price.³⁶⁶

360. Perry, *supra* note 350, at 466; *see also* Fischman et. al., *supra* note 82 (arguing that collaborative governance can encourage less stringent federal regulations and, paradoxically, promote enhanced species recovery).

361. For a more thorough discussion of state animosity towards federal agencies, *see* Dubuc, *supra* note 206, at 260 (showing how Wyoming is an outlier among states in its lack of cooperation and animosity towards federal agencies.)

362. *See id.* at 279-81 (2009) (“The delisting process is not the proper forum for an exercise in federalism [T]he FWS could have, and probably should have, asserted a stronger leadership role in bringing the states together for the purpose of better coordinating their management plans.”).

363. Some commentators also suggest that understanding and addressing regional attitudes towards wolves is central to their recovery. While the FWS excels at scientific decision-making, if it had implemented a more comprehensive public education campaign, it might have mitigated resistance to wolf reintroduction. *See* Hope M. Babcock, *The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program*, 24 *FORDHAM ENV’T L. REV.* 25 (2013).

364. 1980 RECOVERY PLAN, *supra* note 72, at 30-31.

365. *Id.* at 26-30.

366. 2020 Rule, *supra* note 252, at 69812; Maddy Butcher, Opinion, *If only city dwellers who love gray wolves knew what it’s like to live among apex predators*, *WASH. POST*, Feb. 17,

Finally, whether intended by the statute or not, the Service has frequently returned wolf management to states. Other species too have transitioned from federal to state management. But surely, none has gone back and forth as many times as the gray wolf. Even with state wolf population targets in place, state management has not promoted broader recovery of the species.³⁶⁷

The policies that purport to simply maintain wolf populations at sustainable levels can also be understood as backlash against perceived intrusions of the federal government over the past thirty years. Conflicts between wolves and humans in the United States trace back to early colonial days.³⁶⁸ Strong dislike of wolves (for any number of reasons) drove Americans to extirpate them throughout the 19th, 20th, and now 21st centuries.³⁶⁹ Such antipathy continues to underlie the most recent state management of wolves. For example, states' increasingly aggressive management approaches have seized on the dislike for wolves as a way to "stick it to the feds."³⁷⁰ As Ed Bangs, who formerly led wolf recovery in the Northern Rockies noted:

2022, <https://www.washingtonpost.com/opinions/2022/02/17/colorado-city-dwellers-impose-gray-wolves> [<https://perma.cc/AD34-9ERE>].

367. See, e.g., Berrett, *supra* note 231, at 637 (arguing that states have a successful history of managing wolf populations). *But see* Robert B. Keiter, *The Greater Yellowstone Ecosystem Revisited: Law, Science, and the Pursuit of Ecosystem Management in an Iconic Landscape*, 91 U. COLO. L. REV. 1 (2020) (highlighting the lack of coordination between states in managing wolf populations).

368. "Livestock producers and big-game hunters have considered wolves an existential threat since Colonial days. In 1634, a tract called 'New England's Prospect,' by William Wood, described the animals as 'the greatest inconveniency,' noting that there was 'little hope of their utter destruction, the Countrey [sic] being so spacious, and they so numerous.'" Partlow, *supra* note 267. Prior to colonization, the relationship between indigenous peoples and wolves was far less adversarial. See, e.g., ROCKY MOUNTAIN TRIBAL LEADERS COUNCIL, LETTER TO U.S. FISH & WILDLIFE SERV. (Jul. 10, 2019) ("The gray wolf is known by many names among Tribal Nations throughout this land, and for time immemorial has held an esteemed place in the cultures and lifeways of the original inhabitants of this continent.") https://www.globalindigenouscouncil.com/_files/ugd/13fe3b_459a373ae3f34236bb7633063775f4dc.pdf [<https://perma.cc/J5WL-AFLG>]; NATIVE JUSTICE COALITION, LETTER TO U.S. FISH & WILDLIFE SERV. (Jul. 11, 2019) ("For time immemorial, the gray wolf has been held in reverence by Native people. In the realms of the physical and spiritual, the gray wolf has guided, taught, inspired and influenced."), https://www.globalindigenouscouncil.com/_files/ugd/13fe3b_9d49a03588614693a10129419b297c15.pdf [<https://perma.cc/VQQ9-V58Y>]; GLOBAL INDIGENOUS COUNCIL, LETTER TO U.S. FISH & WILDLIFE SERV. (Jul. 15, 2019), https://www.globalindigenouscouncil.com/_files/ugd/13fe3b_551251ad8fc54e46a465ae2842797957.pdf [<https://perma.cc/SY8U-NBRR>].

369. See 2020 Rule, *supra* note 252, at 69794.

370. Partlow, *supra* note 267 ("There is a stick-it-to-liberals flavor to this debate. Around Yellowstone, visiting hunters have heard others bragging about wolf kills. On the Facebook page of one local guide, the O Bar Lazy E Outfitters, are several pictures of slain wolves, including one image where two dead wolves flank a Trump-Pence 2020 campaign sign."); Dubuc, *supra* note 206, at 258 ("This is, after all, the West, and Westerners tend to resent outsiders butting their noses into state politics.")

It's about making 'snowflakes' cry . . . Wild-ass hysteria is driving public policy. Invent a nonissue like too many wolves. Fish and game departments had been doing a good job since delisting. Then the legislatures politicized everything and made wolves a symbol of liberals and outsiders. It's 1850s stuff—let's show how much we hate wolves and the people who like them, and let's stick it to the feds.³⁷¹

And so, states approve more and more brutal methods of killing more and more wolves. What began as a means of balancing conservation and human needs has evolved into all out warfare, similar to the carnage that left gray wolves in the continental United States on the brink of extinction in the first place.

Tribes also played a significant role in this cooperative federalism model, although with much less authority—and antipathy—than states. In fact, Tribal management of wolves significantly predates that of the states.³⁷² As a result, the Service is obligated to consult Tribes in its decision-making process.³⁷³ Within state and federal management plans, Tribes frequently play a

371. Ted Williams, Opinion, *America's New War on Wolves and Why It Must Be Stopped*, YALE ENV'T 360 (Feb. 17, 2022), <https://e360.yale.edu/features/americas-new-war-on-wolves-and-why-it-must-be-stopped> [<https://perma.cc/65R4-W66F>].

372. “Recognizing the wolf as a practitioner of conservation, we, collectively, reaffirm that our ancestors were conservationists before the term existed in the Western lexicon, and that in their honor we agree to perpetuate their principles of caring for Mother Earth that is today called conservation. Fundamental to that is respecting the interrelationships between us and ‘all our relations’ which the wolf embodies. The wolf has a critical role in providing balance, health and structure to ecosystems which benefits a wide spectrum of life, be they two-legged, four-legged, winged, or those with roots.” GLOBAL INDIGENOUS COUNCIL, *THE WOLF: A TREATY OF CULTURAL AND ENVIRONMENTAL SURVIVAL* (2019), https://www.globalindigenouscouncil.com/_files/ugd/13fe3b_4b6903b1915d4ab5a1970eaf40974aba.pdf [<https://perma.cc/4YX4-TVPN>].

373. The Service is required to consult with Native American Tribes on activities that may impact Tribal trust resources. See Memorandum No. 94-10877, 59 Fed. Reg. 22951 ¶ (b) (April 29, 1994) (“Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.”); Exec. Order No. 13,175 3 C.R.F. § 2 ¶ (b) (2001) (“Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.”); DEPARTMENT OF THE INTERIOR, DEPARTMENT MANUAL, Part 512, Chapter 2, § 2.2 (Dec. 1, 1995) (“It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.”); G.A. RES. 61/295, Declaration on the Rights of Indigenous Peoples, Article 19 (Sept. 13, 2007) <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

role in overseeing recovery efforts. For example, in Idaho, the state and the Service authorized the Nez Perce Tribe to monitor and document the recovery status of wolves within the state.³⁷⁴ Furthermore, like states, Tribes can submit management plans to the Service for wolves within their reservations.³⁷⁵ Additionally, under 4(d) rules, Tribes are typically given similar authority as states to use lethal control methods in their territories.³⁷⁶ Under Section 6, Tribes are not eligible to make cooperative agreements and are not extended the same benefits or authorities that result from such agreements.³⁷⁷

Thus, tribal interests are not given the same weight as state interests.³⁷⁸ In its decisions, the Service may recognize Tribal concerns, but frequently responds by throwing up its hands, citing the need to base decisions on scientific information.³⁷⁹ For example, while the Service has recognized Tribal rights on reservations, the Service has declined to apply treaty rights on ceded lands in its management approach.³⁸⁰ Moreover, states also frequently shirk their

(“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”); US DEP’T OF STATE, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011), <https://2009–2017.state.gov/s/srgia/154553.htm> [<https://perma.cc/KYP3-SHQ6>].

374. 2003 REPORT, *supra* note 196, at 29.

375. See 2005 Rule, *supra* note 206, at 1287 (“The 1994 rules governing those experimental populations allowed for increases in the authority of States and Tribes to manage the wolves under a State or Tribal management plan approved by The Service.”).

376. 2003 Rule, *supra* note 61, at 15834-5.

377. See *id.* at 15838 (“However, tribes are not eligible for cooperative agreements under Section 6, so we cannot extend to them any of the other benefits or authorities that come from such agreements. However, tribes can receive permits to take threatened wolves for scientific research or conservation purposes under 50 CFR 17.32.”).

378. The Biden Administration has indicated its intent to strengthen Tribal involvement in decision-making. See Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making, (Nov. 15, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf> [<https://perma.cc/JN7V-C75C>] (creating an Interagency Working Group on Indigenous Traditional Ecological Knowledge and declaring “Where appropriate, ITEK can and should inform Federal decision making along with scientific inquiry.”); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021); Exec. Order No. 13,985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 14,031: Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders, 86 Fed. Reg. 29,675 (May 28, 2021).

379. See, e.g., 2003 Rule, *supra* note 61, at 15838 (“However, the Act provides no authority to extend its protections beyond the point at which a species no longer warrants a threatened or endangered status, so we cannot unreasonably delay or forgo reclassifying or delisting the wolf for cultural or spiritual reasons.”).

380. 2005 Rule, *supra* note 206, at 1295 (“The provisions of this rule are available to Tribal governments only on their reservation lands. Wolf management on private inholdings within reservations without approved Tribal wolf management plans will be coordinated by the Service. The States have lead resident game management authorities outside of

responsibility to ensure that Tribes' treaty rights are fulfilled. In September 2021, following Wisconsin's disastrous wolf hunt in which licensed hunters in Wisconsin far exceeded the quota and killed 218 wolves in four days,³⁸¹ a group of tribes representing the Ojibwe people sued Wisconsin, alleging that the state violated various treaty obligations and failed to base its wolf hunt quota on sound biological data.³⁸²

Thus, the story of the gray wolf continues to serve as a cautionary tale of what happens when the federal government devolves protection of a controversial species to states that do not share the lofty goals of the ESA. Having returned management to the states, Yellowstone saw the deadliest season for the Northern Rocky Mountain wolf in 2021.³⁸³ In less than six months, hunters had eliminated close to one-third of Yellowstone's wolf population.³⁸⁴ Technically, this was within the bounds of neighboring states' hunting regulations that were deemed consistent with recovery targets. Even were it necessary to kill many wolves to help the species recover—a premise that we reject—the prescribed killing does not always jibe with recovery targets. In response to the disastrous wolf hunt in 2021, the Wisconsin Department of Natural Resources increased the limit for the fall wolf hunt to 300 animals.³⁸⁵ Granting full management control of the gray wolf to the states—even with the floor set by recovery goals—has proven disastrous to individual wolves, to the species, and to those humans who care about the species and its component individuals.

States should continue to play a significant role in garnering political support for wolf conservation and, where actually committed to fulfilling the object and purpose of the ESA, to cooperatively fulfilling management duties. However, federal management remains necessary to protect the species from hostile states. Advocates for state-management claim that states are best positioned to smooth public opposition to wolves and tailor management to specific

reservations and should include any Tribal treaty rights in their State management plans.”).

381. Todd Richmond, Judge Issues Injunction Blocking Wisconsin Fall Wolf Hunt, AP NEWS (Oct. 22, 2021), <https://apnews.com/article/environment-and-nature-wisconsin-lawsuits-madison-scott-walker-c08117dbcc2389817ff7a2ce93d2166b> [https://perma.cc/EG3A-FP5T]; The Wisconsin Department of Natural Resources set a target of 200 wolves, but the Ojibwe tribes claimed the right to 81 wolves, pursuant to treaty rights dating back to the 1800s. Will Cushman, *Rights Group Decries Wolf Hunt Process*, PBS WISCONSIN (Mar. 18, 2021) <https://pbswisconsin.org/news-item/extreme-disappointment-ojibwe-treaty-rights-group-decries-wolf-hunt-process> [https://perma.cc/5DL5-ZT2F].

382. Complaint, Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin v. Preston, No. 3:21-cv-00597, 2021 WL 4295633 (Wis. D.C. Sept. 21, 2021). The case is pending but the Fall wolf hunt was enjoined by court order in *Order, Great Lakes Wildlife Alliance et al. v. Wisconsin Natural Resources Board et al.*, No. 21-CV-2103 (Dane Cty. Cir. Ct. Oct. 22, 2021); Richmond, *supra* note 381.

383. Partlow, *supra* note 267.

384. *Id.*

385. The actual number for state-licensed hunters would likely be less depending on what the Ojibwe—who are entitled to claim up to half of the quota under treaty rights—claim in the upcoming season. Richmond, *supra* note 381.

populations.³⁸⁶ The recent history of aggressively “controlling” gray wolf populations through state-sanctioned management plans suggests otherwise.

2. Courts

Although they generally defer to expert agencies, courts remain a backstop to prevent arbitrary agency rules when it comes to endangered species protections. Few species have been subject to the gray wolf’s level of judicial scrutiny, because few agencies have been as arbitrary as the Service has in its machinations. Nearly every agency rule that modified protections for the wolf faced swift legal challenges.³⁸⁷ Agency rules were, and continue to be, frequently vacated by the courts, which have refused to defer to agency expertise where such “expertise” blatantly flaunts the clear mandates of the ESA. As described in Part II, judges see through policies that substitute arbitrary political goals where the ESA mandates scientifically substantiated ecological goals.

Notwithstanding courts’ deferential treatment of the Service’s rulemakings, courts have played an outsized role in listing and delisting decisions for gray wolves. While courts have repeatedly reviewed specific agency interpretations of subsections of the ESA, courts have appeared to be more suspicious of delisting rules and frequently vacate them.³⁸⁸

3. Congress

Congress, too, has played an outsized role in managing gray wolves. It is rare that Congress steps in to displace the Service’s expertise in managing endangered and threatened species. A notable exception to this is the story of the snail darter, where Congress intervened to exempt the Tellico Dam from the provisions of the ESA.³⁸⁹ Similarly, Congress intervened at multiple points to decide the fate of the gray wolf.

First, Congress added the 10(j) rule to the ESA in 1982, which allowed the Service to regulate most gray wolves in the Northern Rocky Mountains as endangered only because they were reintroduced pursuant to this rule.³⁹⁰ While the 10(j) rule was likely included in the ESA amendments to provide flexibility for managing many species, management of wolves was a strong motivator. The legislative history of these amendments mentioned few species, making the explicit references to wolves as a potential application of this new rule particularly striking.

Second, as the Service was reintroducing wolves into Yellowstone, Congress passed a funding ban for reintroductions.³⁹¹ Ultimately the ban expired,

386. See, e.g., Nagle, *supra* note 82, at 386.

387. See *supra*, Part II.

388. See *supra*, Part II.

389. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 154 (1978).

390. H.R. 6133, 97th Cong. § 6(6) (1981) (enacted).

391. Pub. L. No. 102–154, § 105, 105 Stat. 990, 993–94 (1991).

allowing reintroductions to resume, but it showed that Congress was willing to directly intervene to support the Service's plans.

Finally, and most notably, Congress stepped in and required the Service to reinstate the 2009 Rule. Not only did Congress intervene here, but it did so after the Rule had already gone back and forth between the Service and the courts. In doing so, Congress disregarded any reasoning provided by states, courts, or the Service. Instead, through political pressure from a few states, and without debate or discussion, Congress reissued the 2009 Rule through a budget rider.³⁹² It should also be noted that while Tribes have limited influence and authority at the state level, they have far less influence over Congressional action than states. Most importantly, Tribes do not have direct representation in Congress.

D. *Mechanical Recovery Methods*

Throughout their recovery, the Service has moved wolves around the landscape to achieve recovery goals. The concept of a DPS and the 10(j) rule were both added to promote species recovery with increased flexibility.³⁹³ In managing wolves, the Service has consistently used these “flexible” options sometimes to protect the gray wolf, and sometimes to avoid antagonizing the wolves' enemies. Not only are boundaries of wolf populations repeatedly drawn and redrawn, but they are frequently manipulated to achieve specific ends—usually delisting a portion of the species.

Through the “wholly separate” requirement of Section 10(j), the Service fully embraced “species zoning”—that is, the notion that species' populations should be defined based on where they are found, not where they originate.³⁹⁴ At the outset of wolf reintroduction, some warned that this approach was not compatible with wolf behavior and recovery needs.³⁹⁵ This approach makes sense if the Service wishes to manage the natural world according to human desires, and not nature's inclinations. Species zoning simplified enforcement and reduced confusion regarding the protection of individual wolves.

392. See Edward A. Fitzgerald, *Delisting Wolves in the Northern Rocky Mountains: Congress Cries Wolf*, 41 ENV'T L. REP. NEWS & ANALYSIS 10840, 10849 (2011) (“Policy creation through budget riders is flawed. There are no careful deliberations. Committees with subject matter expertise are ignored. There are no hearings, amendments, or debates. The leadership is vested with extraordinary power.”).

393. “It is not The Service's intent to use Section 10(j) as a short-cut to be applied in every circumstance where a translocation or reintroduction has been identified as a viable recovery action. Section 10(j) will only be considered in those instances where the involved parties are reluctant to accept the reintroduction of an endangered or threatened species without the opportunity to exercise greater management flexibility on the introduced populations. When selecting a site fore [sic] reintroduction, biological concerns will be give primary consideration; however, all relevant factors, including economic considerations, will be weighted before any action is proposed.” 1987 RECOVERY PLAN, *supra* note 48, at 81.

394. See generally Cheever, *supra* note 96, at 294 (explaining this concept he coined as “species zoning”).

395. See, e.g., *id.* at 342–50.

As the legislative history of Section 10(j) made clear, however, this approach was not a viable long-term solution.³⁹⁶ At some point, reintroduced populations may and should mix with other populations, despite what the 10(j) rule states.³⁹⁷ Instead of using experimental populations as a temporary means to an end, the Service has reinforced 10(j) rules as the foundation of its wolf management strategy. If successful recovery requires significant mixing between wolf populations, the management and political flexibility granted by Section 10(j) does not outweigh the costs of keeping experimental populations separate for long-term recovery.³⁹⁸

Throughout the history of wolf management, the Service has used DPS designations as a tool for delisting certain geographic wolf populations, including designating DPSs for the purpose of downlisting them.³⁹⁹ While courts have generally found that this approach violates the ESA, the Service has been able to take a less direct approach to achieve the same goals. The Service continuously draws and redraws the boundaries of gray wolf populations, which frequently follow political lines, rather than ones the wolf's biology dictates.

In relying heavily on experimental populations and DPS designations, the Service has isolated reintroduced wolves both geographically and in level of protection.⁴⁰⁰ While this approach may be politically convenient, it diminishes the likelihood that gray wolves will form larger, connected, metapopulations, which are critical to their recovery.⁴⁰¹

As a means to reintroduce wolf populations, DPSs have become central to management of the entire species. But, instead of pursuing comprehensive management practices that would conserve the gray wolf in the long run, the Service has used experimental populations and DPSs to fragment the species and pursue a minimalist approach to conservation.

IV. RETHINKING RECOVERY

The story of gray wolf management continues to evolve. The pendulum of wolf protections (or lack thereof) is bound to continue swinging far into the future. We could avoid these oscillations, which benefit neither human

396. *Id.* at 319 (“While each experimental population must begin its existence as wholly separate from naturally occurring populations, Congress intended the experimental population status to end when that experimental population began to intermingle with wild populations.”).

397. *See id.* at 367 (advocating for adding a temporal limit to 10(j)).

398. Some predicted that 10(j) may hamper recovery by maintaining separation when wolf reintroductions began, and it appears to have played out. *See, e.g.,* Jennifer Li, Note, *The Wolves May Have Won the Battle, but Not the War: How the West Was Won Under the Northern Rocky Mountain Wolf Recovery Plan*, 30 ENV'T L. 677, 696 (2000).

399. *See generally* Nicole M. Tadano, Comment, *Piecemeal Delisting: Designating Distinct Population Segments for the Purpose of Delisting Gray Wolf Populations Is Arbitrary and Capricious*, 82 WASH. L. REV. 795, 796 (2007).

400. *See* Li, *supra* note 398 at 696.

401. *Id.* at 697.

nor nonhuman communities, if we reconsider our notion of “recovery.”⁴⁰² The thread of delisting by meeting numeric recovery goals runs through the entire history of gray wolf conservation. Each decision to remove the gray wolf from the endangered species lists rests on having achieved “recovery,” as defined by the Service. Additionally, this has been exacerbated by the Service’s narrow interpretation of various provisions of the ESA that prevents a more holistic approach to wolf recovery.⁴⁰³ The decades since the Service adopted its numeric definition of recovery for wolf populations have demonstrated the shortcomings of such a narrow approach.

While the Service’s notion of recovery has achieved some localized success, gray wolves remain functionally extinct throughout most of their historic range. As Prof. Martha Williams (the current head of the USFWS) noted, removing broader conversations regarding recovery from delisting decisions has been central to the maddeningly complex history of the gray wolf.⁴⁰⁴ Some species, like the gray wolf, live in recovery limbo: they no longer face acute threats of extinction, but they have not recovered in their historic ranges.⁴⁰⁵ Indeed, others have further attempted to define broader notions of recovery to include ethical and policy discussions beyond strict, numerical recovery targets.⁴⁰⁶

Not only has this approach contributed to the limbo of wolf recovery, but it fails to acknowledge the benefits of restoring keystone species. With its focus on numerical recovery—and conversely, a numeric concept of extinction—the Service fails to protect against *functional* extinction, where animals “are still present but no longer prevalent enough to affect how an ecosystem works.”⁴⁰⁷ Returning wolves, a keystone species, to an ecosystem may result in a “trophic cascade,” with benefits trickling down throughout all levels of the ecosystem.⁴⁰⁸ For example, in Yellowstone National Park, wolf reintroduction reduced elk

402. See W. Ryan Stephens, Note, *Gray Wolf Rising: Why the Clash over Wolf Management in the Northern Rockies Calls for Congressional Action to Define “Recovery” Under the Endangered Species Act*, 36 WM. & MARY ENV’T L. & POL’Y REV. 917 (2012) (suggesting that Congress should define “recovery” under the ESA).

403. See, e.g., Williams, *supra* note 27, at 111 (discussing the implications of the Service’s interpretation of “significant portion of its range”).

404. *Id.* at 144.

405. *Id.* at 151.

406. See Federico Cheever, *The Rhetoric of Delisting Species Under the Endangered Species Act: How to Declare Victory Without Winning the War*, 31 ENV’T L. REP. 11302 (2001); Holly Doremus, *Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation*, 30 ENV’T L. REP. 10434 (2000); Dale D. Goble, *The Endangered Species Act: What We Talk About When We Talk About Recovery*, 49 NAT. RES. J. 1 (2009).

407. Brooke Jarvis, *The Insect Apocalypse is Here*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/magazine/insect-apocalypse.html?searchResultPosition=1> [<https://perma.cc/7WQL-CFP2>].

408. Heacox, *supra* note 271. Note the trophic cascade theory remains biologically controversial. See, e.g., Christopher C. Wilmers, & Oswald J. Schmitz, Effects of gray wolf-induced trophic cascades on ecosystem carbon cycling, 7 ECOSPHERE 1 (2016).

populations, which had boomed in the absence of predators.⁴⁰⁹ During the boom, elk destroyed much of the park's vegetation, which in turn harmed the beaver population, another keystone species.⁴¹⁰ As a result a cascade of species bounced back as wolves brought the elk population under control.⁴¹¹ As the elk grazed less, willows along the banks of streams grew more abundantly (and, as a co-benefit, sequestered more carbon dioxide), beavers quickly returned, their ponds providing crucial habitat for numerous fish, amphibian, reptile, bird, and mammals.⁴¹²

Moreover, these ecosystem benefits also translate into human economic benefits. Not only do wolves attract tourists and indirectly promote plant growth, which sequesters more carbon, but they may even reduce car accidents. In the United States, deer-vehicle collisions annually cause an estimated \$10 billion in economic costs.⁴¹³ Reintroducing wolves, which prey on deer, can substantially reduce vehicle-deer collisions.⁴¹⁴ One study in Wisconsin estimated that reintroducing wolves had reduced deer-vehicle collisions by one quarter, saving approximately \$11 million per year statewide while also saving human lives.⁴¹⁵

The story of the gray wolf illustrates the importance of both federal and local recovery strategies. Federal protection under the ESA may provide an effective floor to prevent regressing towards extirpation. The Service must still be willing to oversee local management to prevent the types of slaughters that state managers have too frequently wrought. But long-term viability of gray wolf populations will likely require some degree of local acceptance and effective state management practices. Because many of the failures of wolf management thus far can be attributed to the disconnect between local concerns and conservation interests, moving forward, successful management of wolf populations depends on investing heavily in building coalitions between ranchers, hunters, biologists, and conservations groups. How to achieve that precarious balancing act reaches beyond the range of this Article.

409. Frank Clifford, *Wolves and the Balance of Nature in the Rockies*, SMITHSONIAN MAG. (Feb. 2009), <https://www.smithsonianmag.com/science-nature/wolves-and-the-balance-of-nature-in-the-rockies-44604810> [<https://perma.cc WR5W-W7F3>].

410. *Id.*

411. *Id.*

412. *Id.*; Robert L. Beschta & William J. Ripple, *Riparian Vegetation Recovery in Yellowstone: The First Two Decades After Wolf Reintroduction*, 198 BIOLOGICAL CONSERVATION 93, 101 (2016).

413. Stephen Dubner, *Can the Big Bad Wolf Save Your Life?*, FREAKONOMICS RADIO (Mar. 23, 2022), <https://freakonomics.com/podcast/can-the-big-bad-wolf-save-your-life> [<https://perma.cc/NL79-XD8R>]. This includes over 30,000 injuries and 200 human fatalities each year. *Id.*

414. *Id.*

415. *Id.*

CONCLUSION

The decades long wolf wars illustrate the challenges of conserving large, iconic, and often loathed (but nonetheless ecologically essential) predators in the United States. It is one thing to write an Endangered Species Act as an intended landmark framework for preventing species from going extinct, and quite another to create systems for implementing adequate long-term management, especially for a species whose very existence provokes controversy. Each subspecies and DPS of wolf pose unique management challenges, many of which the Service has brought upon itself, to the wolves' detriment. Unlike many other species, though, the desires of human communities, not the needs of wolf communities, create those challenges. Wolves are the victims of many well-meaning (and not so well-meaning) federal, state, and local officials, and the citizens who enable them.

The Service's wolf reintroduction programs have certainly aided the wolves' "recovery." But, as this Article has demonstrated, the flexibility through Section 10(j) that made reintroduction politically viable has ultimately cost wolves dearly. It begs the question: has wolf reintroduction done more harm than good? When reintroduction began, wolves were migrating from Canada and beginning to recolonize parts of their historical continental U.S. habitat—including the greater Yellowstone National Park ecosystem—on their own.⁴¹⁶ The Yellowstone reintroductions may have accelerated short-term recovery, but they were not "required" for the U.S. population to recover.⁴¹⁷ Reintroduction through experimental populations did allow the Service to treat wolves as threatened rather than endangered. It may be that by reintroducing wolves—and consequently creating experimental populations—the Service stunted wolf recovery.

Still, despite ongoing controversies, we must marvel at what even ham-fisted application of the ESA has accomplished. In 50 years, gray wolves have recovered from functional extinction towards regaining a presence throughout portions of their range. Although they remain unprotected (as of this writing, at least) at the federal level, Northern Rocky Mountain wolves have made tremendous progress. Additionally, over 6,000 gray wolves now live across the United States.⁴¹⁸ Nevertheless, gray wolves remain functionally extinct in over 80 percent of their historic range and face aggressive state-level threats absent federal protection.⁴¹⁹

416. Daniel H. Pletscher et al., *Population Dynamics of a Recolonizing Wolf Population*, 61 J. WILDLIFE MGMT. 459, 464 (1997).

417. One peer reviewer of the 2019 Rule noted "I disagree with the statement on page 9649 of the proposed delisting rule that recovery of wolves in the northern Rocky Mountains 'required' reintroduction of gray wolves in an experimental population." ATKINS SUMMARY, *supra* note 109.

418. RELIST WOLVES, <https://www.relistwolves.org/myth-vs-fact> (last visited July 30, 2022) [<https://perma.cc/C487-N22T>].

419. *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017).

As advocates and foes continue to debate whether to delist or relist gray wolves under the ESA, the wolves continue their lives, wholly ignorant of the artificial political boundaries that we have drawn. And they will continue to do so, wandering into territories that were once their homes—as most of the United States once was—unaware of the threats they now face.

In the United States in 2022, wolves are often another token of political differences between red states and blue states. Even for people who don't care about wolves, they make useful political pawns, symbolizing the concerns of the elite and citified versus the concerns of the working class and rural. It is a real shame, then, that wolves pay the price of our political strife.

And so, players in the wolf drama continue to impose their own notions of how wolves should behave, rather than managing wolves with their needs as our starting point, as the law requires. In *Of Wolves and Men*, Barry Lopez recounts: “I remember sitting in this cabin in Alaska one evening reading over the notes of all these encounters, and recalling Joseph Campbell, who wrote in the conclusion to *Primitive Mythology* that men do not discover their gods, they create them. So do they also, I thought, looking at the notes before me, create their animals.”⁴²⁰ We project our hopes and fears onto wolves. And what we think about them and do about them says as much about us as it says about them. It does not say promising things about us and our ability to survive as ecological systems unravel during the Anthropocene.

We believe that restricting wolves to narrow swathes of their former range, devolving to cooperative federalism when such “cooperation” leads to wolf slaughter, and kowtowing to the needs of humans and not the needs of wolves, violates the Endangered Species Act and fails to sustain and revitalize ecosystems that support robust human and nonhuman communities. Unless we take the legal mandates of the Endangered Species Act seriously, wolves will remain pawns that represent different ideas of what nature should be and comprise different visions of what kind of country we will be. It is up to us to decide where Wolf Law leads, and whether the wolves—and we—survive and thrive.

420. BARRY LOPEZ, *OF WOLVES AND MEN* 5 (2016).