

CRYING WOLF: THE UNLAWFUL DELISTING OF NORTHERN ROCKY MOUNTAIN GRAY WOLVES FROM ENDANGERED SPECIES ACT PROTECTIONS

Abstract: Although settlers hunted gray wolves to near extinction more than a century ago, the animal remains one of the most enduring symbols of the West. In 1994, the U.S. Fish & Wildlife Service authorized reintroduction of gray wolves into Idaho, Montana, and Wyoming under recovery provisions of the Endangered Species Act. Fourteen years later, the Service delisted wolves in these states, contending that the reintroduced population met the numeric and distributional criteria established for recovery in 1994. Months after a district judge enjoined the Service's 2008 delisting rule, the Service again delisted gray wolves. This Note asserts that both the 2008 and 2009 delisting rules violate provisions of the Endangered Species Act guaranteeing adequacy of state regulatory mechanisms prior to delisting, and fidelity to the best available scientific data. The Note also contends that the Service unlawfully deployed conservation tools as delisting instruments contrary to congressional intent. Lastly, the Note illuminates administrative defects in the delisting rules, namely the Service's decision to disregard its own requirement of genetic linkage among the entire gray wolf population without providing a reasoned explanation.

INTRODUCTION

Paradoxically, the legal battle surrounding gray wolves in the Northern Rocky Mountains began where it might once have ended: at extinction.¹ By 1930, westward settlers had hunted the formerly abundant species to extinction across the territorial West from Washington to Wyoming, California to Colorado.² Under recovery provisions of the Endangered Species Act ("ESA"), however, wolves have been reborn in the past two decades.³ In 1994, the U.S. Fish and Wildlife Service

¹ See Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing this Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 6106, 6106-07 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17) [hereinafter 2007 Rule]; Elizabeth A. Schulte, *From Downlisting to Delisting: Anticipating Legal Actions If Gray Wolves Are Delisted from the Endangered Species Act*, 24 J. LAND RESOURCES & ENVTL. L. 537, 546 (2004).

² See 2007 Rule, 72 Fed. Reg. at 6106-07.

³ *Id.* at 6107-08.

("FWS") introduced gray wolves back into their native West, albeit in narrow pockets of isolated wilderness in Idaho, Montana, and Wyoming.⁴

Gray wolves (*canis lupus*)⁵ live within a social hierarchy in packs of two to twelve animals, with packs typically roaming distinct territories of 200 to 500 square miles.⁶ Only the two dominant animals within a pack breed.⁷ These top-ranking wolves are known as the "alpha" male and female.⁸ Wolf packs vigorously guard their territory, while self-regulating their breeding so not to saturate their range beyond what the available prey can accommodate.⁹ If a pack has exceeded the carrying capacity of its territory, it will cast out younger or older wolves.¹⁰ These wolves, known as dispersers, are forced to survive alone or join another pack where the territory features more ample availability of game.¹¹ This unique social structure is a double-edged sword—prolific yearly mating has allowed the wolf to rebound quickly from a numeric perspective, but the aggressively guarded boundaries of a pack's range make it difficult for reintroduced wolves in the tri-state Northern Rocky Mountain region to accomplish connectivity, or genetic exchange, among the isolated subpopulations.¹²

⁴ See 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. 10,514, 10,514 (Feb. 27, 2008) (to be codified at 50 C.F.R. pt. 17) [hereinafter 2008 Rule].

⁵ The gray wolf is the largest member of the dog family. *E.g.*, 2008 Rule, 73 Fed. Reg. at 10,515. Adult gray wolves range in size from 40–175 lbs. depending on sex and region, and wear a distinctive coat of fur that varies from grizzled-gray to coal black. *E.g.*, *id.* The indigenous range of the gray wolf encompasses most of the coterminous United States, excluding some of the Southeast. *E.g.*, *id.*

⁶ 2007 Rule, 72 Fed. Reg. at 6107.

⁷ *Id.*

⁸ 2008 Rule, 73 Fed. Reg. at 10,514; U.S. FISH & WILDLIFE SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO app. 2, at 5 (Apr. 14, 1994), available at http://www.fws.gov/mountain-prairie/species/mammals/wolf/EIS_1994.pdf [hereinafter GRAY WOLF FINAL EIS]. Alpha pairs produce litters of one to eleven pups for about eight years. *E.g.*, 2008 Rule, 73 Fed. Reg. at 10,514. In the Northern Rockies, only four or five of these pups survive the winter. *E.g.*, *id.* Although gray wolves can live up to thirteen years, the average lifespan of reintroduced wolves in the Northern Rockies is just four years. *E.g.*, *id.*

⁹ 2007 Rule, 72 Fed. Reg. at 6107–08.

¹⁰ *Id.*; GRAY WOLF FINAL EIS, *supra* note 8, app. 2, at 6; see also *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1233–34 (10th Cir. 2000) (noting that wolves are known to disperse and interbreed).

¹¹ 2007 Rule, 72 Fed. Reg. at 6107–08; GRAY WOLF FINAL EIS, *supra* note 8, app. 2, at 6.

¹² GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42 (summarizing a survey of wildlife biologists who determined a viable population of wolves in the Northern Rockies would need to disperse over a wide geography to defeat stagnate genetic exchange and inbreeding).

Wolves lived in this social structure for centuries, but as the population of the West grew, the more human sustenance and commercial profit relied on animal husbandry.¹³ Agricultural operations plowed the wolves' native wild lands and invited conflict.¹⁴ Faced with periodic losses of expensive agricultural property like cattle, sheep and horses by displaced wolves, ranchers and shepherds came to revile the predator.¹⁵ In the twentieth century, Congress waged a campaign of eradication against the wolf and other animals injurious to agriculture in the West.¹⁶ The government program endorsed draconian practices that endure today, including poison baiting, trapping, and land and aerial sharp shooting.¹⁷ The government in concert with Western settlers extirpated the wolf across nearly all of its historic range.¹⁸ In fact, in 1973, the year President Nixon signed the ESA, the animal was only found in Minnesota and Michigan.¹⁹

In 1978, FWS listed the Northern Rocky Mountain subspecies of gray wolf (*canis lupis irremotus*) as endangered.²⁰ FWS first approved a recovery plan in 1980, which called for the reintroduction of 90 to 150 gray wolves from Canada into the Greater Yellowstone National Park Area ("GYA") in northwestern Wyoming, central Idaho, and western Montana.²¹ The Service determined that the region in and around Yellowstone National Park ("YNP") and the vast federally protected wilderness in central Idaho were best suited for reintroduction because of a minimal interface with surrounding livestock and agricultural operations, the ample availability of wild game and native prey, and the quality of the habitat.²²

In 1994, after fourteen years of fits and starts, FWS published a final rule authorizing the reintroduction of gray wolves in Idaho, Mon-

¹³ Schulte, *supra* note 1, at 545 (stating that newly arriving cattlemen and stockowners initiated the effort to eradicate wolves from the West).

¹⁴ *Id.*; see also GRAY WOLF FINAL EIS, *supra* note 8, app. 13, at 57. In North America, there have been essentially no verified accounts of wolves attacking a human. *Id.* app. 15, at 61.

¹⁵ Schulte, *supra* note 1, at 545.

¹⁶ *Id.*

¹⁷ 2008 Rule, 73 Fed. Reg. 10,514, 10,531 (Feb. 27, 2008) ("State authorized wolf control may include, just as the federally authorized control program currently does, gunning from the air and ground, trapping, and in a few cases, removing pups from dens.").

¹⁸ *Id.*

¹⁹ *Id.* at 10,515; Schulte, *supra* note 1, at 538.

²⁰ 2008 Rule, 73 Fed. Reg. at 10,515; Schulte, *supra* note 1, at 537.

²¹ 2008 Rule, 73 Fed. Reg. at 10,520–21. Yellowstone National Park is in northwestern Wyoming, southwestern Montana, and brushes a sliver of eastern Idaho. *Id.*

²² *Id.* at 10,517–20.

tana, and Wyoming.²³ The rule survived challenges in the U.S. Courts of Appeals for the Ninth and Tenth Circuits.²⁴ In 1995 and 1996, hundreds of onlookers watched as wildlife managers released sixty-six juvenile gray wolves from Alberta, Canada into YNP in Wyoming and the Frank Church-River of No Return Wilderness in central Idaho.²⁵

In 1994, with the completion of a Final Environmental Impact Statement ("1994 EIS") analyzing reintroduction, FWS established numeric and distributional, or connectivity,²⁶ benchmarks before Northern Rocky Mountain gray wolves could be removed from ESA protections.²⁷ The population unquestionably rebounded past the numeric margin in just five years, but the connectivity requirement has yet to be fulfilled, as wolves in GYA remain genetically isolated from the Idaho and Montana subspecies.²⁸ Wolves are a keystone species, meaning they strengthen the overall health of their ecosystem.²⁹ In YNP, the return of wolves has harmonized the food chain.³⁰ In turn, a reduction in the overabundance of species that destroyed aspen, willow shoots, and other shrubs has restored whole forest stands and riparian areas, rebuilt eroded stream banks, and bolstered the populations of native bird spe-

²³ See Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,252 (Nov. 22, 1994) (codified at 50 C.F.R. pt. 17). FWS also completed a Final Environmental Impact Statement, which amended and supplemented the criteria for recovery from a prior 1987 Recovery Plan. See GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42. Recovery plans are required by Section 4(f) of the ESA, and Environmental Impact Statements are required by the National Environmental Policy Act ("NEPA"). See Endangered Species Act, 16 U.S.C. § 1533(f) (2006); National Environmental Policy Act, 42 U.S.C. § 4332(c) (2006).

²⁴ *Wyo. Farm Bureau*, 199 F.3d at 1233-34; *United States v. McKittrick*, 142 F.3d 1170, 1172 (9th Cir. 1998).

²⁵ 59 Fed. Reg. at 60,254-55; Bob Weber, *Canadian Wolves Sent to Re-stock the U.S. Might Be Hunted*, *GLOBE & MAIL* (Can.), Feb. 22, 2008, at A9.

²⁶ The term "connectivity" in this Note is used interchangeably with "genetic exchange," meaning outbreeding among geographically isolated wolf packs of all three subpopulations in Idaho, Montana, and the GYA. See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1168 (order granting preliminary injunction).

²⁷ GRAY WOLF FINAL EIS, *supra* note 8, at app. 9, 42. "Delist" signifies to remove a species from ESA protection—literally to take off the list of endangered and threatened wildlife in the Federal Register. See Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (2008).

²⁸ 2007 Rule, 72 Fed. Reg. 6106, 6108 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17).

²⁹ See Complaint ¶ 41, *Defenders of Wildlife v. Salazar*, No. 9:09CV00077 (D. Mont. filed on June 2, 2009) [hereinafter Plaintiffs' 2009 Complaint].

³⁰ *Id.*

cies and beavers.³¹ Wolf predation of nettlesome coyotes has helped resuscitate numbers of the magnificent pronghorn antelope.³²

In 2003, after the population first satisfied the numeric prong of the 1994 EIS, FWS asked Idaho, Montana, and Wyoming to prepare wolf management plans that stated the regulatory methods each state would deploy to guarantee the continued viability of their populations above the minimum recovery baselines (at least thirty breeding pairs and 300 individual wolves).³³ The Service required approval of each state's plan as a precondition to delisting.³⁴ FWS approved the Montana and Idaho plans in 2004.³⁵ Wyoming was a different story.³⁶ The state wrote a daringly recalcitrant plan, which was rejected by FWS in 2004.³⁷ In a quick reversal, however, FWS approved a retooled version in 2007.³⁸

The approval of all three state management plans paved the path for FWS to publish a final rule ("2008 Rule") delisting wolves in the Northern Mountain Rocky Mountain region from ESA protections and transferring absolute authority for wolf management to the three individual states.³⁹ The ink was barely dry on the 2008 Rule before a coalition of environmental groups filed suit challenging the rule.⁴⁰ In July 2008, in *Defenders of Wildlife v. Hall*, the U.S. District Court for the District of Montana issued a preliminary injunction enjoining the service from delisting the gray wolf and restoring ESA protections in the Northern Rocky Mountain region pending final resolution.⁴¹ Two months later, the court granted FWS's procedural motion to enter a vacatur of the 2008 Rule and remand to the Agency for further consideration.⁴²

Exactly two weeks after rebuke from the court, FWS opened comment on another rule proposing to delist gray wolves.⁴³ The following

³¹ *Id.*

³² *Id.*

³³ 2007 Rule, 72 Fed. Reg. at 6128.

³⁴ See 16 U.S.C. § 1533(a)(1)(D) (2006); Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,261 (Nov. 22, 1994) (codified at 50 C.F.R. pt. 17).

³⁵ See 2007 Rule, 72 Fed. Reg. at 6127; *Defenders of Wildlife*, 565 F. Supp. 2d at 1165.

³⁶ 2007 Rule, 72 Fed. Reg. at 6129; *Defenders of Wildlife*, 565 F. Supp. 2d at 1165.

³⁷ See 2007 Rule, 72 Fed. Reg. at 6129–31; *Defenders of Wildlife*, 565 F. Supp. 2d at 1163.

³⁸ 2008 Rule, 73 Fed. Reg. 10,514, 10,549–51 (Feb. 27, 2008).

³⁹ 2008 Rule, 73 Fed. Reg. at 10,514–15.

⁴⁰ See *Defenders of Wildlife*, 565 F. Supp. 2d at 1160.

⁴¹ *Id.* at 1178.

⁴² See Matthew Brown, *Wolves Are Back on Endangered List in Northern Rockies*, ASSOC. PRESS, Oct. 15, 2008.

⁴³ 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 Wild-

week Barack Obama was elected president of the United States.⁴⁴ Two days after his inauguration, President Obama suspended the proposed delist rule, and ordered the rule unpublished pending review by the incoming Secretary of Interior.⁴⁵ To the consternation of many Obama supporters,⁴⁶ however, FWS issued another final rule, the 2009 Rule, delisting wolves in the Northern Rocky Mountains—this time excluding Wyoming.⁴⁷ On June 2, 2009, the same environmental groups filed a complaint challenging the legality of the 2009 Rule, in the same court, before the same judge.⁴⁸

This Note addresses violations of the letter and intent of the ESA and administrative defects in the 2008 and 2009 Rules.⁴⁹ Part I provides essential background on the ESA.⁵⁰ Part II discusses the 1994 EIS and the 2008 Rule, in light of this statutory background.⁵¹ Part III addresses why the *Defenders of Wildlife* court correctly concluded that the 2008 Rule was an arbitrary and capricious exercise of agency authority under the Administrative Procedure Act ("APA").⁵² Part III also includes an exposition of the 2008 Rule's violations of the ESA.⁵³ Part IV briefly reviews FWS's novel additions to the 2009 Rule, which further militate against delisting.⁵⁴

life, 74 Fed. Reg. 15,123, 15,125 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17) [hereinafter 2009 Rule].

⁴⁴ Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 4, 2009, at A1.

⁴⁵ Eve Byron, *White House Suspends Action on Gray Wolf Delisting*, HELENA INDEP. REC., Jan. 22, 2009, at A1.

⁴⁶ See Juliet Eilperin, *Salazar's Wolf Decision Upsets Administration Allies*, WASH. POST, Mar. 14, 2009, at A2. The article quotes an anonymous member of the U.S. House of Representatives, critical of new Secretary of Interior Ken Salazar, as saying "I just don't see what this does for us. . . . Here we are alienating people who did the most—who did a lot to help us in the last election." *Id.*

⁴⁷ 2009 Rule, 74 Fed. Reg. at 15,123.

⁴⁸ See Plaintiffs' 2009 Complaint, *supra* note 29, ¶¶ 4–20.

⁴⁹ See *infra* notes 55–425 and accompanying text.

⁵⁰ See *infra* notes 55–91 and accompanying text.

⁵¹ See *infra* notes 92–155 and accompanying text.

⁵² See Administrative Procedures Act, 5 U.S.C. § 706(2) (A) (2006) (requiring reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); see also *infra* notes 156–301 and accompanying text.

⁵³ See *infra* notes 156–301 and accompanying text.

⁵⁴ See *infra* notes 301–425 and accompanying text.

I. THE ENDANGERED SPECIES ACT

The Endangered Species Act is arguably the most successful and effective—or, obstructionist and inflexible depending on the political vantage point—of the slate of environmental statutes enacted since the 1970s.⁵⁵ The ESA confers primary authority for execution of the Act to the Secretary of the Interior, who has, in turn, delegated administration to the U.S. Fish & Wildlife Service.⁵⁶ The ESA is not just a passive statute—it contains both a shield for conservation of imperiled animals, and a sword that requires affirmative planning for the recovery of any listed species.⁵⁷ This Part discusses the mechanics of the Act pertinent to gray wolf reintroduction in the Northern Rocky Mountains, namely the Section 4 criteria for listing and delisting a species, as well as the Section 10(j) provisions for nonessential experimental populations, a unique class of protected species that includes wolves.⁵⁸

A. Definitions and the Section 4 Listing Process

Congress enacted the ESA with the purpose of providing “a program for the conservation of . . . endangered species.”⁵⁹ Section 3 contains the Act’s operative definitions.⁶⁰ It defines “conservation” as “[t]he use of all methods and procedures which are necessary to bring any endangered species to the point at which the measures provided pursuant to [the ESA] are no longer necessary” and includes artificial means, such as human assisted reproduction.⁶¹ The ESA contemplates two protected classes: endangered species and threatened species.⁶² A species qualifies as endangered if “is in danger of extinction through-

⁵⁵ See Bruce Babbitt, *The Endangered Species Act and “Takings”: A Call for Innovations Within the Terms of the Act*, 24 ENVTL. L. 355, 356 (1994).

⁵⁶ 16 U.S.C. § 1532(15) (2006). FWS has primacy for enforcing the ESA’s application to all avian, terrestrial, and freshwater species in the United States under the imprimatur of the secretary. Schulté, *supra* note 1, at 539. Certain marine species fall under the ambit of the National Marine Fisheries Service in the Commerce Department. *Id.*

⁵⁷ See 16 U.S.C. § 1533(a)(1)(A)–(D), (f) (2006); see also *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977) (holding that the Act illuminates Congress’ clear intent to “do far more than merely avoid elimination of [a] protected species. It must bring these species back from the brink so that they may be removed from the protected class.”).

⁵⁸ See 16 U.S.C. § 1533(a)(1)(A)–(E), (f); 16 U.S.C. § 1539(j) (2006).

⁵⁹ 16 U.S.C. § 1531(b) (2006).

⁶⁰ See *id.* § 1532.

⁶¹ *Id.* § 1532(3).

⁶² *Id.* § 1532(20). A species is “threatened” when it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.*

out all or a significant portion of its range."⁶³ The provision defines "species" as any "subspecies of fish or wildlife or plants, and any *distinct population segment* ("DPS") of any species of vertebrate fish or wildlife which interbreeds when mature."⁶⁴ Congress did not define the term DPS, but FWS has since denominated DPSs by geographic boundaries based on the discreteness of the species within those bounds and how imperiled the population remains compared to the species in its overall range.⁶⁵ In 1996, FWS authored a policy that states the purpose of the DPS as conservation tool for listing subspecies that qualify for protection in a discrete geographic region, even if not imperiled in its entire range.⁶⁶ FWS stated the DPS tool should be utilized to prevent a "large-scale decline" that would necessitate a broader listing.⁶⁷

Section 4 is the statute's principal engine—establishing the listing protocol that determines which species qualify for ESA protection.⁶⁸ Section 4(a)(1) requires FWS to list species as endangered or threatened based on five enumerated factors, one of which is "the adequacy of existing regulatory mechanisms."⁶⁹ The presence of even one of the Section 4(a) factors triggers a mandatory listing.⁷⁰ Importantly, Section 4(b)(1)(A) mandates that FWS make all listing determinations solely on the basis of the best scientific and commercial data available.⁷¹

⁶³ *Id.* § 1532(6).

⁶⁴ *See id.* § 1532(16) (emphasis added). When the ESA was originally enacted in 1973, the definition of the term species included only "species, subspecies or any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." *See Humane Soc'y v. Kempthorne*, 579 F. Supp. 2d 7, 11 (D.C. Cir. 2008).

⁶⁵ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996) [hereinafter DPS Policy]; *see Humane Soc'y*, 579 F. Supp. 2d at 12. Under this policy, FWS announced three factors it would consider in deciding whether to designate a DPS: (1) the discreteness of the population in relation to the remainder of the taxon to which it belongs; (2) the significance of the population to the taxon; and (3) the conservation status of the population segment in relation to the ESA's standards for listing. DPS Policy, 61 Fed. Reg. at 4725.

⁶⁶ DPS Policy, 61 Fed. Reg. at 4725.

⁶⁷ *Id.* (stating the DPS permits FWS to "conserve species and ecosystems upon which they depend before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range").

⁶⁸ 16 U.S.C. § 1533(a)(1)(A)-(E) (2006).

⁶⁹ *Id.* The five listing factors are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) over utilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* § 1533(b)(1)(A).

Unlike many regulatory statutes, economic considerations are flatly impermissible.⁷² Just as FWS is tasked with listing imperiled species, so too must it remove (i.e. delist) them when the species is adequately recovered in light of the Section 4(a) factors and the best scientific and commercial data.⁷³ Since the presence of one factor justifies listing, a species shall not be delisted if even one of the five Section 4(a) factors is present; in other words, an affirmative showing of any factor dispositively mandates continued listing.⁷⁴ Section 4(f) is the instrument for developing and implementing an enforceable recovery plan for each listed species.⁷⁵ Finally, Section 11(c) confers jurisdiction on the U.S. District Courts for any suits arising under the ESA.⁷⁶

B. Section 10(j) Experimental Populations

Not surprisingly, a chorus of critics emerged in opposition to the ESA, and in response, Congress amended the Act in 1982 to include more flexibility for private landowners who live near protected wildlife.⁷⁷ Originally, Section 9 enacted a blanket prohibition on the "taking" of any protected species.⁷⁸ Section 11 imposes criminal and civil penalties of up to one year in prison and a \$50,000 fine for illegal takings.⁷⁹ Several of the 1982 amendments cleared channels around the absolute prohibition against takings.⁸⁰ Section 10(j), which enabled the wolf recovery effort in the Northern Rockies by authorizing reintroduc-

⁷² See *id.*; see also *id.* § 1533(f) (A) (ordering FWS to give priority to endangered species above "construction or other development projects or other forms of economic activity").

⁷³ *Id.* § 1533(c) (2) (i)-(iii).

⁷⁴ See 16 U.S.C. § 1533(c) (2) (B); Factors for Listing, Delisting or Reclassifying Species, 50 C.F.R. § 424.11(d) (1984); Schulte, *supra* note 1, at 543.

⁷⁵ 16 U.S.C. § 1533(f) (1) (B) (ii). The provision commands the Service to include in each recovery plan "objective, measurable criteria, which, when met, would result in a determination . . . that the species be removed from the list." *Id.*

⁷⁶ See 16 U.S.C. § 1540(c), (g) (2006). Section 6 is also of note, as it allows FWS "to enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species." *Id.* § 1535(b) (2006).

⁷⁷ See H.R. CONF. REP. NO. 97-835, pt. 6, at 29 (1982) (stating Section 10(j) "addresses the concerns of private landowners who are faced with having otherwise lawful actions not requiring federal permits prevented by Section 9 prohibitions against taking").

⁷⁸ 16 U.S.C. § 1538(a) (1) (A)-(G) (2006). "Take" is defined by Section 3(19) as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2006).

⁷⁹ See 16 U.S.C. § 1540(a), (b) (2006).

⁸⁰ See, e.g., 16 U.S.C. § 1539(j) (2006) (allowing special rules for experimental populations).

tion⁸¹ of endangered species back into their once native habitat, also creates a new class of listed species with diminished legal protections.⁸² The provision at once strengthened and diluted the mode and method of endangered species recovery, adding the significant tool of reintroduction to the recovery palette, while permitting much more management flexibility, including federal and state-sanctioned killing of a listed species.⁸³ The Section 10(j) class is different in numerous respects, not the least of which is the name: "experimental population."⁸⁴ By default, Section 10(j)(2) entitles an experimental population to the same degree of protection afforded a species listed as threatened pursuant to Section 4(a),⁸⁵ but FWS may then classify the reintroduced species as nonessential, which authorizes FWS to codify special rules that may abrogate Section 9's stark takings ban and enumerate exceptions, including lethal measures.⁸⁶

The nonessential designation greatly relaxes the rigors of the ESA and invites FWS to draft recovery plans for reintroduced populations with a host of regulatory flexibility.⁸⁷ Section 10(j) appears to be a compromise aimed at endangered, but predatory species, like the wolf, that menace domesticated animals and enrage local ranching interests.⁸⁸ Indeed, gray wolves in Idaho, Montana, and Wyoming are a Section 10(j) nonessential experimental population.⁸⁹ And indeed, since reintroduction, state and federal wildlife managers have killed hundreds of wolves after confirmed depredation of a domestic animal.⁹⁰

⁸¹ *Id.* § 1539(j)(1).

⁸² *See id.*

⁸³ *See id.*; Special Rules-Vertebrates, 50 C.F.R. § 17.84 (1994).

⁸⁴ *See* 16 U.S.C. § 1539(j)(1).

⁸⁵ *Id.* § 1539(j)(2)(C).

⁸⁶ *See id.* § 1539(10)(j)(2)(B), (C)(i); 50 C.F.R. § 17.81-.82; *see also* 50 C.F.R. § 17.84(i) (establishing special rules pursuant to Section 10(j) for gray wolves, including permissible takes for livestock owners in certain defense of property circumstances).

⁸⁷ H.R. REP. NO. 97-835, pt. 6, at 28-29. In fact, in one of the few challenges to the validity of the Section 10(j) provisions, the U.S. Court of Appeals for the Ninth Circuit wrote "Congress' specific purpose in enacting section 10(j) was to 'give greater flexibility to the Secretary.'" *McKittrick*, 142 F.3d at 1174.

⁸⁸ *See* H.R. REP. NO. 97-835, pt. 6, at 28-29.

⁸⁹ 2007 Rule, 72 Fed. Reg. 6106, 6108 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17). Wolves in YNP, however, are by operation of Section 10(j)(2)(1) treated as "threatened." *See* 16 U.S.C. § 1539(j)(2)(1). Experimental populations within a national park are barred from classification as "nonessential." *Id.*

⁹⁰ *See* 2008 Rule, 73 Fed. Reg. 10,514, 10,531 (Feb. 27, 2008). In response to fierce opposition to wolf reintroduction, the environmental group Defenders of Wildlife established the Bailey Wildlife Foundation Proactive Carnivore Conservation Fund, which has paid more than \$1 million to ranchers and sheepherders in Idaho, Montana, and Wyoming for the loss of 1,141 head of cattle and 2,113 sheep. DEFENDERS OF WILDLIFE, WOLF COMPENSATION

Although the Section 10(j) compromise certainly cleared the regulatory thicket for gray wolf reintroduction in the Northern Rocky Mountains, it hardly plucked any of the political thorns.⁹¹

II. THE LISTING AND DELISTING OF THE NORTHERN ROCKY MOUNTAIN GRAY WOLF

In 1980, FWS approved a recovery plan for the Northern Rocky Mountain gray wolf pursuant to Section 4(f)⁹² of the ESA.⁹³ In 1987, FWS revised the recovery criteria, and invited public involvement.⁹⁴ By 1994, the reintroduction effort still was stalled in the internecine workings of the Department of the Interior, frustrated by political wrangling among conservationists, ranching interests, and reluctant state governments.⁹⁵ That year, FWS published the 1994 EIS on gray wolf reintroduction.⁹⁶ With that, the Agency enacted a rule establishing a nonessential experimental population of gray wolves in Idaho, Montana, and Wyoming—finalizing the release of wolves back into the Northern Rockies.⁹⁷ This Part discusses the recovery criteria delineated in the 1994 EIS; Idaho's, Montana's, and Wyoming's respective wolf manage-

TRUST PAYMENT STATISTICS (2009), <http://www.defenders.org> (follow "resources" & "publications"; then search "Wolf Compensation Trust, 2009"). These figures include payments in New Mexico and Arizona, where a few reintroduced Mexican wolves have depredated livestock as well. *Id.*

⁹¹ See, e.g., James Brooke, *Yellowstone Wolves Get an Ally in Tourist Trade*, N.Y. TIMES, Feb. 11, 1996, at A1. The article is an early summary of the political battle lines over wolf reintroduction, stating that in response to western Republicans slashing \$200,000 from the recovery project, President Clinton visited wolf pups in YNP before release. *Id.* Also, the article describes the twenty-one percent increase in YNP tourism directly attributed to visitors hoping to spot a wolf, while at the same time anti-wolf memorabilia like the popular "Wolf Management Team" T-shirt, showing a wolf's head in a rifle sight, with the slogan: "Shoot, Shovel and Shut up," sold in high numbers. *Id.*

⁹² Under ESA Sections 4(c)(2)(B)(i)–(iii) and 4(f), no listed endangered species may be delisted if its recovery does not satisfy the criteria set forth in its recovery plan. 16 U.S.C. § 1533(c)(2)(B)(i)–(iii), (f)(1)(B)(ii) (2006).

⁹³ See 2008 Rule, 73 Fed. Reg. 10,520–21.

⁹⁴ U.S. FISH & WILDLIFE SERV. & N. ROCKY MOUNTAIN WOLF RECOVERY TEAM, NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN, at v–vi (Aug. 3, 1987) [hereinafter WOLF RECOVERY PLAN].

⁹⁵ See Brooke, *supra* note 91.

⁹⁶ See GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42. NEPA requires full disclosure and public participation in any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c) (2006).

⁹⁷ Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,252 (Nov. 22, 1994) (codified at 50 C.F.R. pt. 17).

ment plans effective upon delisting; and the particulars of FWS's 2008 Rule.⁹⁸

A. *The 1994 EIS*

FWS's 1987 recovery plan set a purely numeric threshold to evaluate gray wolf recovery.⁹⁹ The 1994 EIS augmented the 1987 recovery criteria, after finding that a pure numeric standard would be insufficient to ensure the viability of gray wolves upon delisting, and lead to rapid inbreeding.¹⁰⁰ The new analysis also imposed an additional distributional requirement, demanding incontrovertible proof of genetic connectivity¹⁰¹ among isolated subpopulations in the three states.¹⁰² The 1994 EIS memorialized these two pronged numeric and genetic recovery criteria as: "[t]hirty or more breeding pairs comprising some 300+ wolves in a meta-population with genetic exchange between the subpopulations."¹⁰³

After the completion of the 1994 EIS, FWS published a final rule,¹⁰⁴ authorizing reintroduction and classifying wolves in Idaho, Montana, and Wyoming as nonessential experimental populations under ESA Section 10(j).¹⁰⁵ FWS, however, adopted several special rules, thus exercising the management flexibility that is allowed under the Section 10(j) umbrella.¹⁰⁶ FWS designated federal, state,

⁹⁸ See *infra* notes 99–155.

⁹⁹ See WOLF RECOVERY PLAN, *supra* note 94, at v. In addition to the absence of all ESA Section 4(a) factors, the following numeric and temporal criteria were to be met: "for three consecutive years, a minimum of ten breeding pairs are documented in each of the three recovery areas [in Montana, Idaho, and Wyoming]." Final Rule Reclassifying and Removing the Gray Wolf from the List of Endangered and Threatened Wildlife and Establishing Two Special Regulations for Threatened Gray Wolves; 68 Fed. Reg. 15,804, 15,818 (2003), *invalidated by* *Defenders of Wildlife v. Secretary, U.S. Dep't. of Interior*, 354 F. Supp. 2d 1156, 1170–71 (D. Or. 2005).

¹⁰⁰ GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42. The criteria were revised after review of a survey of leading wildlife biologists. *Id.*

¹⁰¹ Genetic connectivity is defined as genetic exchange (outbreeding) between isolated populations of wolves in the three core recovery areas. *Id.*; see *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1168.

¹⁰² GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

¹⁰³ *Id.* The 1994 EIS emphasized the importance of genetic connectivity: "It is fairly clear that ten breeding pairs in isolation [in each of Montana, Idaho, and Wyoming] will not comprise a 'viable' population (i.e., have a high probability of survival for a long period without human intervention)." *Id.*

¹⁰⁴ Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,252 (Nov. 22, 1994) (codified at 50 C.F.R. pt. 17).

¹⁰⁵ *Id.* at 60,255–56.

¹⁰⁶ See 50 C.F.R. § 17.84(i) (1994).

or tribal¹⁰⁷ wildlife managers to take problem wolves that harass, bite, attack, or kill agricultural property.¹⁰⁸ The manner of these takings is discretionary, but has included methods across the continuum from relocating a problem wolf deeper into the wilderness to trapping to aerial gunning from helicopters and fixed wing airplanes.¹⁰⁹ Private landowners are permitted to kill or injure a wolf, but only if it is caught in the act of harassing, wounding, or killing livestock.¹¹⁰

B. State Wolf Management Plans

In 2003, after the population met the numeric recovery target for three consecutive years,¹¹¹ FWS asked Idaho, Montana, and Wyoming to prepare wolf management plans specifying the methods each state recommended to maintain a viable wolf population upon delisting.¹¹² Looming over each state decision was the lofty obligation of ESA Section 4(a)(1)(D), which requires FWS to appraise and guarantee the adequacy of existing state regulations before delisting.¹¹³ In 1999, the governors of Idaho, Montana, and Wyoming signed a Memorandum of Understanding—renewed in 2002—that committed them to maintain their respective state populations at a minimum of ten breeding pairs and one hundred wolves.¹¹⁴

¹⁰⁷ Several sovereign American Indian tribes living in Montana, Idaho and Wyoming, including the Nez Perce in Idaho and the Blackfoot in Montana, have a hand in shaping wolf-recovery policy. See GRAY WOLF FINAL EIS, *supra* note 8, at vii.

¹⁰⁸ 2008 Rule, 73 Fed. Reg. 10,514, 10,531 (Feb. 27, 2008).

¹⁰⁹ *Id.*

¹¹⁰ 50 C.F.R. § 17.84(i)(3)(ii).

¹¹¹ It took five years for the gray wolf populations in the three recovery areas to exceed the numeric margin. 2007 Rule, 72 Fed. Reg. 6106, 6108 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17). The population exceeded the target again in each year between 2001 and 2006. *Id.* In 2006, censuses counted 22 breeding pairs and 283 wolves in Montana, 42 breeding pairs and 650 wolves in Idaho, and 25 breeding pairs and 310 wolves in Wyoming, for a total of 1243 wolves in the Northern Rocky Mountain region. *Id.* The number of wolves increased again, to about 1545 wolves in 2007. See Brown, *supra* note 42. The 2008 census showed the pace of population growth slowing to eight percent for a total of 1645 wolves (846 in Idaho, 497 in Montana, and 302 in Wyoming). See Matthew Brown, *Wolf Numbers up Again in Northern Rockies but Expansion Slowing*, ASSOC. PRESS, Mar. 17, 2009.

¹¹² See 2007 Rule, 72 Fed. Reg. at 6108.

¹¹³ See 16 U.S.C. § 1533(a)(1)(D) (2006); 2007 Rule, 72 Fed. Reg. at 6108.

¹¹⁴ 2007 Rule, 72 Fed. Reg. at 6126.

The Montana Fish, Wildlife, & Parks Department's ("MFWP") management plan regulates wolves as big game animals.¹¹⁵ In Montana, big game status imposes criminal and civil penalties on any party that takes a wolf, but provides key exemptions for public hunts regulated by MFWP and for defense of property (e.g., livestock).¹¹⁶ MFWP only committed to maintaining a safety margin of fifteen breeding pairs and 150 wolves at all times, but stated without numerical reference that it would maintain a "biologically sustainable" population.¹¹⁷ Aside from permissible takes, only MFWP predator control officers can kill wolves in response to confirmed depredation of livestock.¹¹⁸ The Montana, Fish, Wildlife & Parks Commission, a body appointed by the governor, assumes authority to set wolf seasons and mortality limits for public hunts.¹¹⁹ In 2008, the Montana Legislature passed a public hunt limit for as many as 130 wolves in year one—roughly one-third of the state's more than four hundred wolves.¹²⁰ The hunt was forestalled by the grant of a preliminary injunction in *Defenders of Wildlife*.¹²¹ After the 2009 Rule, MFWP set a lower wolf mortality quota for the fall public hunt—seventy-five wolves.¹²²

The Idaho Department of Fish & Game ("IDFG") drafted Idaho's Wolf Conservation and Management Plan.¹²³ Likewise, IDFG classifies wolves as big game animals.¹²⁴ IDFG's wolf management plan would also maintain a safety margin of fifteen breeding pairs and 150 individual wolves.¹²⁵ IDFG set a goal of sustaining the wolf population at 2005 to 2007 levels, which represents between 518 and 732 wolves.¹²⁶ The Idaho plan also authorizes public hunts via permit with wolf mortality

¹¹⁵ MONT. FISH, WILDLIFE, & PARKS DEP'T, MONTANA FINAL ENVIRONMENTAL IMPACT STATEMENT 79 (2004). Other big game animals in Montana include elk, moose, black bears, and mountain lions. *Id.*

¹¹⁶ *See id.*

¹¹⁷ *Id.* at 8, 109.

¹¹⁸ *Id.* at 81.

¹¹⁹ *Id.* at xii.

¹²⁰ Defenders of Wildlife, Comments on Montana Hunting and Trapping Regulations for Wolves (Feb. 13, 2008), http://defenders.org/programs_and_policy/wild-life_conservation/imperiled_species/wolves/wolf_recovery_efforts/northern_rockies_wolves/management_and_policy/index.php.

¹²¹ *See* 565 F. Supp. 2d at 1178.

¹²² Matthew Brown, *Montana Sets Quota for 75 Wolves; Idaho Next*, ASSOC. PRESS, July 9, 2009.

¹²³ IDAHO DEP'T OF FISH & GAME, IDAHO WOLF MANAGEMENT PLAN 2008–2012, at 1 (Steve Nadeau ed., 2008).

¹²⁴ *Id.* at 29.

¹²⁵ *Id.* at 19.

¹²⁶ *Id.* at 1.

quotas set by the Idaho Fish & Game Commission ("IFGC"), a politically appointed body.¹²⁷ Illegal takes are punishable by criminal and civil penalties enacted into the Idaho Code. In May 2008, IFGC announced a wolf-hunting season for the fall and winter of 2008, which allotted permits to kill 428 of the state's more than eight hundred wolves within the year.¹²⁸ The hunt was forestalled by the district court's grant of injunctive relief.¹²⁹ In 2009, after delisting, the IFGC established a mortality quota for its first fall hunt at 220 wolves, about one-quarter of the state's population at the time of the decision.¹³⁰ The IFGC, by a four-to-three margin rejected a 430 wolf mortality limit.¹³¹

Wyoming is a different story.¹³² In 2003, the Wyoming Legislature passed a statute affixing trophy¹³³ status to wolf populations within YNP and the surrounding Grand Teton National Park ("GTNP"), Beartooth-Absaroka, Teton, and other federally protected wilderness areas.¹³⁴ The law turns nettlesome in its classification of wolves outside the trophy lands—lands, which not coincidentally, interface more frequently with ranches, farms, grazing pastures, and oil and gas drilling sites.¹³⁵ There, wolves are designated as predatory animals¹³⁶ and fall under the jurisdiction of the Wyoming Department of Agriculture, rather than a wildlife agency.¹³⁷ The state permits limitless killing of predatory animals by

¹²⁷ *Id.* at 1, 29.

¹²⁸ Press Release, Idaho Fish & Game Commission, F & G Commission Adopts Wolf Hunting Rules (May 22, 2008), available at <http://fishandgame.idaho.gov/apps/releases/view.cfm?NewsID=4405>.

¹²⁹ See *Defenders of Wildlife*, 565 F. Supp. 2d at 1178.

¹³⁰ Roger Phillips, *Idaho Sets a Limit of 220 for Wolf Hunt*, IDAHO STATESMAN, Aug. 18, 2009, at A5. IFGC expects roughly 70,000 hunters to receive tags to kill wolves, though they noted that hunting wolves is difficult. *Id.* The IFGC Commission Chairman, who voted for the 430-wolf threshold, said forestalling an injunction "played a role" in the lower 2009 quota. *Id.*

¹³¹ *Id.*

¹³² See 2007 Rule, 72 Fed. Reg. 6106, 6129 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17).

¹³³ The trophy classification is similar to the big game status envisioned in the Montana and Idaho management plans. See *id.* at 6128–32.

¹³⁴ See *id.* at 6132.

¹³⁵ See *id.* at 6129.

¹³⁶ Wolves classified as "predatory"

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

Id. at 6129 (emphasis added).

¹³⁷ *Id.*

an array of lethal measures.¹³⁸ FWS rejected Wyoming's 2003 management plan under Section 4(a)(1)(D) of the ESA as inadequate to prevent excessive human-caused mortality.¹³⁹

C. The 2008 Rule

In February 2007, FWS issued a proposed delist rule¹⁴⁰ that: (1) established a Northern Rocky Mountain Distinct Population Segment ("NRM DPS"), including wolves in the entireties of Montana, Idaho, and Wyoming, the eastern one-third of Washington and Oregon, and a sliver of north-central Utah, where episodic dispersers and one or two packs have migrated;¹⁴¹ and (2) removed gray wolves within the NRM DPS from federal ESA protection.¹⁴² The rule would grant Idaho and Montana absolute authority for wolf management under the framework of the plans already approved by FWS.¹⁴³ The proposed rule preserved federally protected status for Wyoming wolves until the state adopted an adequate regulatory plan.¹⁴⁴

Also in 2007, the Wyoming Legislature amended the rejected 2003 wolf management plan by expanding the trophy game area, with its more stringent regulatory controls, to include more public and private lands flanking YNP.¹⁴⁵ Wyoming numerically bifurcated its wolf management plan—pledging to maintain eight breeding pairs inside YNP, and seven breeding pairs in the public and private lands that round out the composition of the trophy area.¹⁴⁶ In February 2008, FWS approved the retooled Wyoming plan as part of its 2008 Rule.¹⁴⁷ With the Wyoming problem solved, FWS published the 2008 Rule, which (1) found all state regulatory mechanisms adequate to conserve the recovery population and transferred absolute authority for wolf management to

¹³⁸ 2007 Rule, 72 Fed. Reg. at 6129.

¹³⁹ *Id.* at 6131; see 16 U.S.C. § 1533(a)(1)(D) (2006).

¹⁴⁰ 2007 Rule, 72 Fed. Reg. at 6106.

¹⁴¹ See, e.g., Becky Kramer, *Gray Wolf Pack Is State's Second*, SPOKANE SPOKESMAN-REV., July 14, 2008, at A1; Michael Milstein, *Wolves Breeding Again in Oregon*, OREGONIAN, July 22, 2008, at A1.

¹⁴² See 2007 Rule, 72 Fed. Reg. at 6106.

¹⁴³ See *id.* at 6128.

¹⁴⁴ *Id.* at 6106–07.

¹⁴⁵ See 2008 Rule, 73 Fed. Reg. 10,514, 10,514–16 (Feb. 27, 2008); WYO. GAME & FISH COMM'N, FINAL WYOMING GRAY WOLF MANAGEMENT PLAN 4 (Nov. 16, 2007).

¹⁴⁶ WYO. GAME & FISH COMM'N, *supra* note 145, at 4, 10.

¹⁴⁷ 2008 Rule, 73 Fed. Reg. at 10,549 (declaring "this plan, if implemented, will provide adequate regulatory protections to conserve Wyoming's portion of a recovery wolf population"). FWS supported its approval of Wyoming's plan by citing a study that the trophy areas support seventy percent of the state's suitable wolf habitat. *Id.* at 10,550.

the states;¹⁴⁸ (2) determined that delisting was statutorily required because none of the ESA's Section 4(a) factors were present in the NRM DSM;¹⁴⁹ and (3) concluded that the wolves in the NRM DPS met the measurable recovery criteria of the 1994 EIS.¹⁵⁰

Although the 1994 EIS set forth a bright line requirement of genetic exchange between the subpopulations before the meta-population is considered viable, the 2008 Rule offered no proof of genetic exchange among wolves in all three recovery areas.¹⁵¹ Instead, FWS assumed, *arguendo*, that the genetic exchange recovery standard was satisfied by the equitable distribution of wolf breeding pairs among the three states and documented dispersal into the GYA.¹⁵² FWS wrote that these current conditions provided the opportunity for genetic and demographic mixing.¹⁵³ This justification in the 2008 Rule is an optimistic prospectus, but its future tense construction appears in tension with the present tense requirement of genetic exchange memorialized in the 1994 EIS.¹⁵⁴ Nonetheless, FWS published the 2008 Rule in February 2008, and with that, wolves in the Northern Rocky Mountains were outside the province of the ESA.¹⁵⁵

III. THE 2008 RULE: RIGHTFULLY ENJOINED BY *DEFENDERS OF WILDLIFE v. HALL*

The plaintiffs¹⁵⁶ filed their complaint in *Defenders of Wildlife v. Hall* in the U.S. District Court for the District of Montana in Missoula, Montana, in April 2008.¹⁵⁷ The remedy sought was declaratory and injunctive relief, primarily asking District Judge Donald W. Molloy to enjoin

¹⁴⁸ *Id.* at 10,514.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* In explaining its analysis of the recovery targets in the 1994 EIS, FWS offered the caveat that "[the ESA] requires us to ensure a species is no longer threatened or endangered not that its viability would be theoretically maximized." *Id.*

¹⁵¹ 16 U.S.C. § 1533(b)(1)(a) (2006); 2008 Rule, 73 Fed. Reg. 10,514–59.

¹⁵² 2008 Rule, 73 Fed. Reg. at 10,522.

¹⁵³ *Id.*

¹⁵⁴ *Id.*; GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

¹⁵⁵ See 2008 Rule, 73 Fed. Reg. at 10,514.

¹⁵⁶ A coalition of eleven environmental groups, including named plaintiff Defenders of Wildlife, the National Resource Defense Council, the Sierra Club, and the Humane Society of the United States, challenged the FWS 2008 Rule. Complaint ¶¶ 10–13, *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008) (No. 908CV00056). The defendants are H. Dale Hall, U.S. Fish & Wildlife Service Director; Dirk Kempthorne, U.S. Secretary of Interior; and FWS. *Id.* ¶¶ 25–27.

¹⁵⁷ See 565 F. Supp. 2d at 1162.

FWS from delisting wolves in the NRM DPS.¹⁵⁸ This Part argues that two FWS decisions—amounting to the legal backbone of the 2008 Rule—render the rule a fatally arbitrary and capricious exercise of agency authority.¹⁵⁹ After a cursory synopsis of the political climate surrounding wolves and a brief primer on administrative law, this Part argues that the *Defenders of Wildlife* order rightfully determined that FWS acted arbitrarily for two reasons: (1) lack of connectivity, and (2) inadequacy of the state regulatory mechanisms.¹⁶⁰ First, the delisting of the NRM DPS, absent affirmative proof of genetic connectivity among the three subpopulations, impermissibly changed the Agency's own recovery standards without a reasoned explanation, as required by the doctrine espoused by the U.S. Supreme Court in 1983 in *Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, which states that an agency may not reverse its own guiding policies without a "reasoned analysis."¹⁶¹ Second, and among other defects, the Agency's abrupt approval of Wyoming's 2007 wolf management plan contravened the inviolate commands of Section 4(a)(1)(D) of the ESA and the same controlling principles of administrative law.¹⁶²

A. *The Big Bad Wolf: Political Backdrop in Idaho, Montana, and Wyoming*

All three governors, and the state political apparatuses in Idaho, Montana, and Wyoming, have long been opposed to gray wolf reintroduction.¹⁶³ The 2008 Rule was published under the watch of Secretary of Interior Dirk Kempthorne.¹⁶⁴ A former senator and governor of Idaho, Kempthorne, in 2003, said that the ESA has only been successful "in creating litigation, controversy and conflict."¹⁶⁵ In 2006, months be-

¹⁵⁸ See 5 U.S.C. § 551 (2006); 16 U.S.C. § 1540(g) (2006).

¹⁵⁹ See *infra* notes 163–301 and accompanying text.

¹⁶⁰ See *infra* notes 163–301 and accompanying text.

¹⁶¹ See 463 U.S. 29, 41–44 (1983).

¹⁶² 16 U.S.C. § 1533(a)(1)(D) (2006); see 2008 Rule, 73 Fed. Reg. at 10,549.

¹⁶³ See *Defenders of Wildlife*, 565 F. Supp. 2d at 1160 (listing the states of Idaho, Montana, and Wyoming and even Idaho Governor C.L. "Butch" Otter, as Defendant-Intervenors).

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., Dirk Kempthorne, Gov. of Idaho, Address at the University of California, Santa Barbara, Rx for the ESA: The Endangered Species Act at Thirty, 10 (Nov. 12, 2003) (on file with author). In 2009, wolves killed 601 cattle, sheep, llamas, dogs and other domestic animals, the most ever by forty percent. See Brown, *supra* note 111. Still, that represents about one domestic animal for every three wolves. See *id.* In the end, the political skirmish over wolves is about more than the periodic loss of agricultural property. It is something much bigger: how wolves' habitat is used. Environmentalists want the habitat jealously conserved. Opponents would tend to value economic interests like gas drilling, mining, logging, grazing, or commercial development. Federalism plays an important role,

fore his appointment to the Department of the Interior, Governor Kempthorne told a joint session of the Idaho Legislature: “[w]e won’t stop until we make history by delisting wolves in Idaho.”¹⁶⁶ The change in presidential administration ushered in Secretary of Interior Ken Salazar, who unlike Kempthorne was not an outspoken opponent of gray wolf reintroduction.¹⁶⁷ But, in appointing a fifth-generation cattle rancher, some wolf proponents sensed reason for concern with President Obama’s selection.¹⁶⁸ Indeed, though the 2009 Rule began under Kempthorne, it received Salazar’s blessing.¹⁶⁹

The states’ current political corps are also stolid in their opposition.¹⁷⁰ Dave Freudenthal, the Democratic governor of Wyoming, has publicly questioned whether to kill all wolves outside YNP.¹⁷¹ Idaho Republican Governor C.L. “Butch” Otter famously told a crowd of sportsmen that he planned to bid on the first ticket to hunt a wolf.¹⁷² After the Montana court enjoined the 2008 Rule, the Idaho Senate passed a bill that required the state to send letters offering to pay for export of gray wolves to any obliging states.¹⁷³ More ominously, an Idaho Fish & Game commissioner, who votes to set the quotas for wolf hunts, threatened that wolves would be killed whether delisted or not.¹⁷⁴ Montana’s Gov-

with the ESA reviled in principle by many Westerners who generally resent federal control of local land.

¹⁶⁶ Dirk Kempthorne, Gov. of Idaho, State of the State Address to a Joint Session of the Second Session of the 58th Idaho Legislature, 9 (Jan. 12, 2006), available at http://dfm.idaho.gov/cdfy2007/Speech/SP_2006StateoftheState.pdf.

¹⁶⁷ See John M. Broder, *Environmentalists Wary of Obama’s Interior Pick*, N.Y. TIMES, Dec. 17, 2009, at A30.

¹⁶⁸ See *id.* (quoting an Arizona State Senator as saying “[h]e often favors industry and big agriculture in battles over global warming, fuel efficiency and endangered species”).

¹⁶⁹ Eilperin, *supra* note 46, at A2.

¹⁷⁰ See, e.g., Jared Miller, *Wolf Dispute Could Extend for Years*, CASPER STAR-TRIB., Feb. 13, 2007, at A1.

¹⁷¹ *Id.*

¹⁷² Jesse Harlan Alderman, *Idaho Governor Wants to Kill All but 100 Wolves in State*, ASSOC. PRESS, Jan. 12, 2007. One day after IFGC announced a 2009 wolf season, Otter told a reporter he would buy a wolf tag and hoped to bag one during the fall hunt. Rocky Barker, *Gov. Otter Prepares to Buy Wolf Tag and Hunt This Fall*, IDAHO STATESMAN, Aug. 19, 2009, <http://www.idahostatesman.com/newsupdates/story/870564.html>.

¹⁷³ Posting of Betsy Z. Russell to Eye on Boise: The Spokane Spokesman-Review Blog on Idaho Politics, <http://www.spokesman.com/blogs/boise/2009/feb/05/senate-backs-bill-export-wolves/> (Feb. 3, 2009, 10:39 PST).

¹⁷⁴ Jason Kauffman, *Fish & Game Prepares for Fall Wolf Hunt*, IDAHO MOUNTAIN EXPRESS & GUIDE, Aug. 5, 2009, at A1.

error, Democrat Brian Schweitzer, also has followed his constituents in supporting delisting.¹⁷⁵

B. *The State Farm Doctrine and a Brief Primer on Principles of Administrative Law*

It is settled law that a federal agency must articulate with reasonable clarity its reasoning behind any decision.¹⁷⁶ Significantly, in the context of *Defenders of Wildlife*, an agency's policy is allowed to change, as delisting policy did from 2002, when FWS last reaffirmed a genetic exchange requirement, to 2008, when the agency delisted gray wolves despite no evidence of genetic linkage among wolves in the GYA.¹⁷⁷ As memorialized in *State Farm*, however, decisions that shift an agency's position must be accompanied by a reasoned analysis indicating that prior policies are being deliberately changed and not casually ignored.¹⁷⁸ Writing for the *State Farm* majority, Justice White elaborated on other common characteristics that render agency decisions arbitrary and capricious: when the agency

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁷⁹

¹⁷⁵ Rocky Barker, *Did the Bushies Set up Obama on the Wolf Issue?*, IDAHO STATESMAN, Jan. 19, 2009, http://voices.idahostatesman.com/2009/01/15/rockybarker/did_bushies_set_obama_wolf_issue.

¹⁷⁶ 5 U.S.C. § 706(2) (2006); see, e.g., *State Farm*, 463 U.S. at 41–44; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419–20 (1971); see also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir., 1970).

¹⁷⁷ *State Farm*, 463 U.S. at 42; *Greater Boston*, 444 F.2d at 852 (stating that an agency's previous decision is not frozen as permanent policy, but a change must be accompanied by a reasoned explanation); see *Defenders of Wildlife*, 565 F. Supp. 2d at 1171 (confirming that FWS affirmed the genetic exchange requirement as recently as 2002).

¹⁷⁸ *State Farm*, 463 U.S. at 42; *Greater Boston*, 444 F.2d at 852. The reasoned analysis requirement assures Congress that the agency's policies remain within the scope of delegated powers, and are applied without unreasonable discrimination. See *State Farm*, 463 U.S. at 41–42; *Greater Boston*, 444 F.2d at 851.

¹⁷⁹ *State Farm*, 463 U.S. at 43; see also 5 U.S.C. § 706(2)(A); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (stating that agency "expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to become 'a monster which rules with no practical limits on discretion'"); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L.

Lastly, the Court cautioned that reviewing courts are not permitted to review the record based on an attorney's "post hoc rationalizations;" an administrative action is only to be upheld on the basis of the agency's original rationale.¹⁸⁰

C. The 2008 Rule Violates Principles of Administrative Law and the ESA

The *Defenders of Wildlife* court granted the plaintiffs' motion for a preliminary injunction and restored ESA protections to wolves in the NRM DPS.¹⁸¹ It is a cogent opinion that deploys both case law interpreting administrative agency decisions, as well as the sturdy armor of the ESA.¹⁸² The remainder of this Part will analyze the two fatal errors in the 2008 Rule: the lack of genetic connectivity among the subpopulations in the three core recovery areas and the inadequacy of Wyoming's 2007 wolf management plan.¹⁸³

1. Lack of Connectivity

The 1994 EIS required genetic connectivity among the subpopulations of reintroduced wolves in the core recovery areas of central Idaho, western Montana, and GYA in Wyoming as a precondition to delisting.¹⁸⁴ Ultimately, the court in *Defenders of Wildlife* held that FWS had not proved genetic connectivity, nor could it change policy from the 1994 EIS without a reasoned analysis.¹⁸⁵

a. Parties' Arguments

FWS's own biological data demonstrated that, prior to delisting, no such genetic exchange occurred between the GYA population and the other two subpopulations.¹⁸⁶ The vonHoldt Study, commissioned by FWS in 2007, analyzed 200 wolves in all three core recovery areas for genetic variation.¹⁸⁷ The study determined that wolves in Idaho and Montana displayed some genetic diversity and, importantly, established

REV. 757, 815 (1991)(stating that *State Farm* unequivocally held that an agency may not consider political solutions when engaging in administrative rulemaking).

¹⁸⁰ *State Farm*, 463 U.S. at 49–50.

¹⁸¹ See 565 F. Supp. 2d at 1178.

¹⁸² See *id.* at 1160–78.

¹⁸³ See *infra* notes 186–301 and accompanying text.

¹⁸⁴ GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

¹⁸⁵ See 565 F. Supp. 2d at 1171.

¹⁸⁶ See *id.* at 1169; GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

¹⁸⁷ Bridgett vonHoldt et al., *The Genealogy and Genetic Viability of Reintroduced Gray Wolves*, 17 MOLECULAR ECOLOGY 252, 254 (2008).

corridors of connectivity.¹⁸⁸ The population in GYA, however, remained genetically and geographically isolated.¹⁸⁹ The long-term extrapolation of genetic data forecasted increased losses of genetic variation and eventual inbreeding within sixty years.¹⁹⁰ Plaintiffs capitalized on the vonHoldt Study, arguing that (1) delisting without proof of genetic exchange plainly contravened the Agency's own criteria for recovery in the 1994 EIS,¹⁹¹ and (2) the Agency offered no sufficiently reasoned explanation for abandoning its own recovery requirement of genetic exchange.¹⁹² In concert, these actions amounted to bald violations of the *State Farm* principle and made the 2008 Rule an arbitrary and capricious exercise of agency power.¹⁹³

In its brief to the Montana court, FWS began its defense of its about-face on the 1994 EIS requirement of genetic exchange by acknowledging two points that would ultimately become fatal: (1) as recently as 2002, FWS reviewed and reaffirmed, without revision, the 1994 EIS and its bifurcated numeric and genetic recovery criteria;¹⁹⁴ and (2) at the time of delisting, FWS held no empirical evidence of genetic exchange by GYA wolves.¹⁹⁵ Nonetheless, FWS supported the unlawfully premature delisting by citing evidence that at least four radio-telemetry-collared wolves from Idaho, and at least two wolves from northwestern Montana, have naturally dispersed to the GYA.¹⁹⁶ FWS reasoned that the ability of wolves to disperse in and out of the GYA was affirmative proof that the conditions are clearly present for genetic connectivity to occur.¹⁹⁷ In the alternative, the Agency stated that the vonHoldt Study demonstrated such high genetic diversity of GYA wolves, due to the genetic strength of the founding pairs, that despite isolation, the population would not encounter threats to its future viability.¹⁹⁸

¹⁸⁸ *Id.* at 257–58.

¹⁸⁹ *Id.* at 257.

¹⁹⁰ *Id.* at 269–70.

¹⁹¹ See *Defenders of Wildlife*, 565 F. Supp. 2d at 1168–72; Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 57.

¹⁹² See *Defenders of Wildlife*, 565 F. Supp. 2d at 1168–72; Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 57.

¹⁹³ See 5 U.S.C. § 706(2) (2006); *State Farm*, 463 U.S. at 43.

¹⁹⁴ Defendants' Opposition to Motion for Preliminary Injunction at 10, *Defenders of Wildlife*, 565 F. Supp. 2d at 1160 (No. 908CV00056).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 5. Some reliable scientific estimates peg the number of dispersers into Wyoming at as few as four wolves, over the thirteen years since reintroduction. *Defenders of Wildlife*, 565 F. Supp. 2d, at 1170.

¹⁹⁷ Defendants' Brief, *supra* note 194, at 5.

¹⁹⁸ 16 U.S.C. § 1532(6), (20) (2006); 16 U.S.C. § 1533(a)(1)(A)–(E) (2006); Defendants' Brief, *supra* note 194, at 6.

FWS also asserted that because the term “genetic exchange” is not defined in the 1994 EIS, genetic connectivity between all three of the subpopulations is not necessarily a mandatory precondition for delisting.¹⁹⁹ In the alternative, the Service invoked *State Farm*, arguing that even if the recovery criteria has not been met, the 2008 Rule provided a “reasoned explanation” for the absence of the formerly required genetic connectivity.²⁰⁰ Therefore, FWS stated that the 2008 Rule guarantees the continued absence of all of the ESA Section 4(a) listing factors in conformity with the statute.²⁰¹ Lastly, the Service pressed the court to grant substantial deference to its scientific expertise, particularly surrounding the decision to disregard its own vonHoldt Study.²⁰² FWS argued that the study’s predictions of inbreeding and increased juvenile mortality did not amount to the required best available scientific and commercial data.²⁰³ After dispensing with its own study, FWS claimed that in light of documented dispersals and the unreliability of the vonHoldt Study, genetic exchange likely already had occurred.²⁰⁴

b. *Analysis of Defenders of Wildlife’s Findings*

i. The Plain Construction of the 1994 EIS Demands Genetic Exchange Among All Three Subpopulations

A plain language reading of the 1994 EIS debunks most of FWS’s defense for the abandonment of the genetic connectivity requirement.²⁰⁵ In his order, Judge Molloy correctly stated that FWS was disingenuous to argue that the 1994 EIS required only the potential for connectivity, not concrete proof of genetic mixing.²⁰⁶ Indeed it is.²⁰⁷ The 1994 recovery criteria demand “a meta-population with genetic

¹⁹⁹ Defendants’ Brief, *supra* note 194, at 11.

²⁰⁰ See *id.* at 11–12. Again, this argument rests on the assumption that limited dispersal of lone wolves from Idaho and Montana and a strong genetic foundation of the Wyoming populations’ founding pairs will provide adequate protection of the species. *Id.* at 5–13.

²⁰¹ See *id.*

²⁰² See 16 U.S.C. § 1533(b) (1) (A); Defendants’ Brief, *supra* note 194, at 12–13.

²⁰³ Defendants’ Brief, *supra* note 194, at 12–13. FWS contends that there is likely already a genetic link because: (1) the study’s predictive modeling represents a “worst-case scenario” based on unrealistic assumptions; (2) the model erred in capping the YNP wolf population at its winter nadir, not its springtime high; and (3) the study only examined wolves in the national park, not throughout the entire GYA. *Defenders of Wildlife*, 565 F. Supp. 2d at 1169.

²⁰⁴ Defendants’ Brief, *supra* note 194, at 12–13.

²⁰⁵ See GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

²⁰⁶ *Defenders of Wildlife*, 565 F. Supp. 2d at 1169.

²⁰⁷ See *id.*

exchange between the subpopulations."²⁰⁸ This meta-population prong of is satisfied by the evidence, albeit scant, of dispersers from Idaho and Montana reaching the GYA region.²⁰⁹ The 1994 EIS's operative definitions, however, offer the caveat that a meta-population comprised of genetically isolated subpopulations would not be viable against unexpected environmental or stochastic events.²¹⁰ The definition itself addresses the need for genetic variants to be mixed among the subpopulations.²¹¹ In its defense of delisting, though, FWS intentionally conflates the terms "meta-population" and "genetic exchange," even though the 1994 EIS emphasizes that the genetic requirement is in addition to a meta-population connected by mere dispersals.²¹² Therefore, evidence of dispersals is inapposite; the 1994 EIS does not require a meta-population where the subpopulations merely interact.²¹³ The requirement is two-tiered and absolute: there must be a meta-population that displays genetic exchange.²¹⁴ The decision in *Defenders of Wildlife*, however, does not provide as much analytic depth.²¹⁵ Rebuffing FWS's argument that genetic exchange is not defined in the 1994 EIS, the court wrote that the term genetic exchange only has one permissible construction: actual exchange of genetic material between the subpopulations.²¹⁶

²⁰⁸ GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 39. The definition of a "meta-population" is provided as follows:

In nature many populations exist as partially isolated sets of sub-populations, termed "meta-populations." Genetic variability lost within each sub-population can be offset by new variants being reintroduced by interchange between sub-populations. Moreover, a meta-population is less vulnerable to demographic and environmental stochasticity. Extinction of one sub-population is likely to be followed by recolonization from another—contrasted with, for example, a scenario in which all individuals living within a single area are poisoned out and that area is too isolated for new colonizers to reach it. In a true meta-population, dispersers from one sub-population are likely to reach and rekindle the sub-population in another area.

Id.

²⁰⁹ See GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 39; vonHoldt et al., *supra* note 187, at 257.

²¹⁰ GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 39.

²¹¹ See *id.*

²¹² Defendants' Brief, *supra* note 194, at 9–11; see GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

²¹³ See GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 39, 42; see also Defendants' Brief, *supra* note 194, at 11.

²¹⁴ See GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 39, 42.

²¹⁵ See *Defenders of Wildlife*, 565 F. Supp. 2d at 1169–72.

²¹⁶ *Id.*

ii. FWS's Rejection of the vonHoldt Study Violates Section 4(b)(1)(A) of the ESA and the *State Farm* Principle

Next, FWS argues in bad faith when it contends that genetic exchange likely has occurred despite the contrary evidence of the vonHoldt Study.²¹⁷ The Service itself commissioned the study.²¹⁸ At the time, FWS trusted the biologists to conduct the study and endorsed its method.²¹⁹ Only when the study's results became inconvenient did FWS seek to expose it as flawed.²²⁰ To dismiss an empirically sound study, with no available studies to the contrary, is a plain violation of the command of ESA Section 4(b)(1)(A) that all decisions rest on the best available scientific information.²²¹ Even assuming the study overlooked the possibility that genetic mixing already occurred among GYA wolves, the burden would fall to FWS to affirmatively demonstrate the requisite exchange.²²² The recovery plan in the 1994 EIS does not state that the wolf population becomes viable when there is a conceivable possibility that genetic exchange has occurred.²²³ If FWS distrusted the vonHoldt Study, its duty was not to delist wolves based on mere possibility, but to carry the burden of proving genetic exchange to meet the recovery criteria, and then to verify the absence of the ESA Section 4(a) factors.²²⁴

Secondly, FWS speaks with two voices regarding the vonHoldt Study, depending on whether the biological data is politically expedient.²²⁵ To support delisting, FWS relies on the study's findings that the current genetic diversity remains strong among GYA wolves, yet discards the data on genetic isolation.²²⁶ FWS cannot have it both ways—the study is either part of the canon of the best available science or it is not.²²⁷ Congress did not intend for agencies to cherry-pick excerpts from scientific literature to support preordained decisions.²²⁸

²¹⁷ See *id.* at 1170; Plaintiffs' Reply to Federal Defendants' Preliminary Injunction Brief at 2–3, *Defenders of Wildlife*, 565 F. Supp. 2d at 1160 (No. 908CV00056).

²¹⁸ *Defenders of Wildlife*, 565 F. Supp. 2d at 1168.

²¹⁹ See 2008 Rule, 73 Fed. Reg. 10,514, 10,531, 10,540, 10,553 (Feb. 27, 2008).

²²⁰ See Defendants' Brief, *supra* note 194, at 12–13 (stating FWS's position that its own vonHoldt Study is unreliable).

²²¹ See 16 U.S.C. § 1533(b)(1)(A) (2006).

²²² See *Defenders of Wildlife*, 565 F. Supp. 2d at 1171 (holding that “[t]he Service provides no new evidence or research to support its change of course”).

²²³ See GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

²²⁴ See 16 U.S.C. § 1533(a)(1), (f); *Defenders of Wildlife*, 565 F. Supp. 2d at 1171.

²²⁵ See 2008 Rule, 73 Fed. Reg. 10,514, 10,531, 10,540, 10,553 (Feb. 27, 2008); Defendants' Brief, *supra* note 194, at 12–13.

²²⁶ See 2008 Rule, 73 Fed. Reg. at 10,553; Defendants' Brief, *supra* note 194, at 12–13.

²²⁷ See 16 U.S.C. § 1533(b)(1)(A).

²²⁸ See *id.* § 1533(b)(1)(A), (f).

Finally, the repudiation of the vonHoldt Study is arbitrary and capricious under the *State Farm* doctrine requiring reasonable articulation of agency policy changes.²²⁹ FWS favors the *possibility* that genetic exchange has occurred over the statistically significant *probability* articulated in the vonHoldt Study.²³⁰ *State Farm* firmly counsels that an action is invalid if it is supported by an explanation that runs counter to the evidence before that agency.²³¹ Without a contrary showing, FWS's projection that genetic exchange might have occurred is embarrassingly contradicted by the Service's own vonHoldt Study.²³² The *State Farm* alarm bells ring through every tepid justification by FWS for rejecting the vonHoldt Study.²³³ Judge Molloy rightfully refused to accept FWS's jettison of the vonHoldt Study.²³⁴ He found no flaw with the study's statistical significance, and neither does FWS.²³⁵ Also, the judge was troubled by evidence showing only four to twelve documented dispersals into Wyoming in thirteen years.²³⁶ The judge acceded that the low number of dispersals, bolstered even further by the vonHoldt Study's findings, represents compelling evidence that genetic exchange had yet to occur.²³⁷

iii. FWS's Decision to Delist Absent Genetic Connectivity Violates the *State Farm* Principle

FWS invoked *State Farm* to support its decision to forgo the 1994 EIS's genetic exchange criteria, arguing that it had provided a reasoned explanation.²³⁸ Hypothetically, if the 2008 Rule cited new scientific findings that episodic dispersers are a better barometer of population viability than genetic diversity, or a contrary showing of genetic mixing, these likely would represent reasoned explanations for the sudden insuperability of the 1994 EIS.²³⁹ Instead, the 2008 Rule addresses the policy detour by discussing documented dispersals into the GYA, and

²²⁹ See 463 U.S. at 43 (stating agency decisions may not "run[] counter to the evidence before the agency").

²³⁰ Defendants' Brief, *supra* note 194, at 5 (emphasis added).

²³¹ 463 U.S. at 43.

²³² vonHoldt et al., *supra* note 187, at 257.

²³³ See 463 U.S. at 43.

²³⁴ *Defenders of Wildlife*, 565 F. Supp. 2d at 1170 (stating, inter alia, that the study's failure to collect DNA samples from wolves outside of YNP does not render it useless).

²³⁵ See *id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See *State Farm*, 463 U.S. at 42; Defendants' Brief, *supra* note 194, at 11 ("[E]ven if the Court were to find that the 1994 recovery criteria has not been fully met, the delisting decision should still be upheld because the Final Rule provides a reasoned explanation.").

²³⁹ See *State Farm*, 463 U.S. at 42-43.

then defends the decision at trial with the post hoc rationalization that smaller wolf populations have survived in isolation for decades.²⁴⁰ But, *State Farm* sets clear parameters: decisions are reviewed based on the agency's own explanations, not ex post facto rationalizations in the courtroom.²⁴¹

The preliminary injunction might have been granted without more discussion beyond a dismissal of FWS's facially immaterial post hoc rationalization,²⁴² but, FWS's ex post facto explanations can be dismantled just as readily.²⁴³ FWS, in 1987, published a recovery target based purely on a numerical abundance.²⁴⁴ Yet, in 1994, FWS added a genetic component to reflect the consensus recommendation of wildlife biologists.²⁴⁵ Beyond that, FWS reaffirmed the two pronged numeric and genetic criteria as recently as 2002.²⁴⁶ FWS's explanation for the about-face—its stated optimism that future dispersers will genetically mix—is so boldly unpersuasive that it cannot objectively be considered “reasoned” under the *State Farm* test.²⁴⁷

Judge Molloy refused to accept, as a *State Farm*-worthy explanation, FWS's argument that dispersals are a promising predictor of genetic exchange.²⁴⁸ But even assuming the dispersal theory is supported by evidence, this purported reasoned analysis still remains critically flawed.²⁴⁹ Idaho, Montana, and Wyoming each plan to reduce their wolf stocks through public hunts, intensified state predator-control operations, and liberalized defense of property laws.²⁵⁰ Fewer wolves would lead to fewer dispersers, which would lead to a drastically diminished chance for genetic exchange, not a greater chance as FWS ar-

²⁴⁰ 2008 Rule, 73 Fed. Reg. 10,514, 10,553 (Feb. 27, 2008) (stating that lack of genetic connectivity is not a threat “because other wolf populations have persisted at lower levels and with lower genetic diversity for decades or centuries”).

²⁴¹ 463 U.S. at 50 (citing *Burlington Truck Lines*, 371 U.S. at 168).

²⁴² See *State Farm*, 463 U.S. at 50 (citing *Burlington Truck Lines*, 371 U.S. at 168); 2008 Rule, 73 Fed. Reg. at 10,553.

²⁴³ See *Defenders of Wildlife*, 565 F. Supp. 2d at 1170 (holding FWS “provides no persuasive reasons for this change in course that were not known in 1994, when the new criteria were established, or in 2001 and 2002, when the criteria were reaffirmed”).

²⁴⁴ See WOLF RECOVERY PLAN, *supra* note 94, at v-vi.

²⁴⁵ GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

²⁴⁶ 2008 Rule, 73 Fed. Reg. at 10,553; Defendants' Brief, *supra* note 194, at 5, 10.

²⁴⁷ See *State Farm*, 463 U.S. at 42–43; *Defenders of Wildlife*, 565 F. Supp. 2d at 1170.

²⁴⁸ *Defenders of Wildlife*, 565 F. Supp. 2d at 1170.

²⁴⁹ See *State Farm*, 463 U.S. at 42–43; *Defenders of Wildlife*, 565 F. Supp. 2d at 1170–71.

²⁵⁰ See IDAHO DEP'T OF FISH & GAME, *supra* note 123, at 18; MONT. FISH, WILDLIFE, & PARKS DEP'T, *supra* note 115, at 109; WYO. GAME & FISH COMM'N, *supra* note 145, at 10, 15.

gues.²⁵¹ The argument fails a keystone requirement of administrative law: that the agency demonstrate a rational connection between the facts found and the choice made.²⁵²

2. Adequacy of the State Regulatory Mechanisms

Section 4(a)(1)(D) of the ESA demands a showing by FWS of the adequacy of the existing state regulatory mechanisms before a species may be delisted.²⁵³ Failing this standard, the *Defenders of Wildlife* court ruled that Wyoming's 2007 wolf management plan was grossly inadequate.²⁵⁴

a. *The Parties' Arguments*

The plaintiffs specifically targeted Wyoming's wolf recovery plan as inadequate pursuant to ESA Section 4(a)(1)(D).²⁵⁵ FWS rejected the plan in 2003, providing a lengthy rejection of the state's refusal to commit to managing fifteen breeding pairs statewide, while allowing unregulated killing of wolves in most of the state, save the trophy animal pocket of northwestern Wyoming.²⁵⁶ The 2007 plan, although somewhat expanding the trophy area, still allows state wildlife officials to manage to a lower bound of seven breeding pairs outside the relatively narrow trophy game area and permits unregulated private and public control through an arsenal of lethal methods in the predatory zone.²⁵⁷ Although the trophy area represents just ten percent of the state, Wyoming does not even codify fixed boundaries for the trophy area.²⁵⁸ Instead, as plaintiffs rightfully illustrated, the state retains discretion to scale down the trophy area.²⁵⁹ Plaintiffs argued that the approved 2007 plan offers a paltry reformation of the inadequate 2003

²⁵¹ See *Defenders of Wildlife*, 565 F. Supp. 2d at 1172 (stating "[t]he change of course is especially problematic in this case because delisting will undeniably reduce the chances for future genetic exchange").

²⁵² *State Farm*, 463 U.S. at 43 (citing *Burlington Truck Lines*, 371 U.S. at 168).

²⁵³ See 16 U.S.C. § 1533(a)(1)(D) (2006).

²⁵⁴ See 565 F. Supp. 2d at 1172-76.

²⁵⁵ Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 60.

²⁵⁶ 2007 Rule, 72 Fed. Reg. 6106, 6131 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17); Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 47.

²⁵⁷ WYO. GAME & FISH COMM'N, *supra* note 145, at 15; 2007 Rule, 72 Fed. Reg. at 6129.

²⁵⁸ WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) (2007) (vesting in WGFC authority to scale down the size of the trophy game area if "the diminution does not impede the delisting of gray wolves").

²⁵⁹ *Id.*

state plan.²⁶⁰ Plaintiffs correctly contended that (1) the 2008 Rule violates ESA Section 4(a)(1)(D);²⁶¹ and (2) FWS's reversals of position on the sufficiency of the Wyoming plan's numeric differentiation between national park and non-national park boundaries, and the bifurcation of trophy game and predatory animal regions, cannot pass muster under *State Farm*.²⁶²

For its part, FWS argued that the 2007 plan cures all defects from the prior framework.²⁶³ FWS stated that the nominally expanded trophy area represents seventy percent of the state's suitable wolf habitat.²⁶⁴ Despite the contradictory statutory language, FWS also argued that the trophy area is fixed because the 2007 plan clearly identifies the borders in a map addendum.²⁶⁵ To combat the difficulties of numeric bifurcation, FWS points to new language in the 2007 plan that pledged Wyoming's commitment to maintain fifteen breeding pairs in the state—eight in the national parks and at least seven in the expanded trophy game area outside YNP and GTNP.²⁶⁶ This pledge comes in the form of a certification by the state Attorney General attesting that Wyoming law will be interpreted to maintain fifteen breeding pairs statewide.²⁶⁷ Thus, the Service argued, ESA Section 4(a)(1)(D) is not contravened and the regulatory apparatus does not imperil the long-term viability of wolves.²⁶⁸

b. *Analysis of Defenders of Wildlife's Findings*

i. Wyoming's 2007 Management is an Inadequate Regulatory Mechanism under ESA Section 4(a)(1)(D)

In 2003, FWS rejected Wyoming's wolf management plan for two stated reasons: (1) the plan did not commit to managing at least fifteen breeding pairs (ten pairs, as required by the 1994 recovery criteria plus a five pair cushion); and (2) the predatory status of wolves throughout most of the state permitted unregulated human-caused mortality, which

²⁶⁰ See Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 60.

²⁶¹ See *id.*

²⁶² See *Defenders of Wildlife*, 565 F. Supp. 2d at 1174; Plaintiffs' 2008 Complaint, *supra* note 156, at ¶ 60.

²⁶³ 2008 Rule, 73 Fed. Reg. 10,514, 10,549–50 (Feb. 27, 2008).

²⁶⁴ *Id.* at 10,549.

²⁶⁵ Defendants' Brief, *supra* note 194, at 14 (arguing "[t]he 2007 Wyoming plan clearly identifies the borders of the trophy game area in Figure 1").

²⁶⁶ 2008 Rule, 73 Fed. Reg. at 10,550.

²⁶⁷ Defendants' Brief, *supra* note 194, at 14.

²⁶⁸ *Id.* at 13–14.

was inadequate pursuant to ESA Section 4(a)(1)(D).²⁶⁹ The 2007 plan does not cure either of these defects.²⁷⁰

The original plan called for maintenance of seven breeding pairs in the trophy area encompassing the GYA.²⁷¹ Outside this pocket of northwestern Wyoming, wolves received predator status, a class essentially subjected to unregulated killings.²⁷² In the 2007 plan, Wyoming augmented the trophy area with additional private and public lands, but wolves still remain classified as predators across ninety percent of the state.²⁷³ At the time of the 2003 rejection, FWS instructed Wyoming to designate wolves as trophy game statewide because predator status allowed unregulated lethal controls that could not survive analysis under ESA Section 4(a)(1)(D).²⁷⁴ FWS offers no showing why the nominal expansion of the trophy game area in 2007 remedies a framework previously determined to jeopardize the recovery of wolves.²⁷⁵ Left unexplained, the window-dressed 2007 plan still fails to satisfy the commands of the ESA.²⁷⁶ The 2003 plan also established a bifurcated numerical criteria: Wyoming wolves remained classified as predatory so long as seven breeding pairs survived outside YNP, or fifteen breeding pairs remained statewide.²⁷⁷ In 2003, FWS rejected this so-called "seven or fifteen" test.²⁷⁸ FWS rightfully reasoned that these management benchmarks created a loophole where fewer than fifteen breeding pairs could exist statewide, without triggering the tipping point where all wolves defaulted to trophy status.²⁷⁹ FWS gave the example of three

²⁶⁹ 2007 Rule, 72 Fed. Reg. 6106, 6131 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17); Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 47. For further discussion of unregulated nature of the predatory area, see *supra* note 136.

²⁷⁰ *Defenders of Wildlife*, 565 F. Supp. 2d at 1174; see WYO. GAME & FISH COMM'N, *supra* note 145, at 4, 10, 15 (stating that, like the previous flawed plan, Wyoming would only commit to managing seven breeding pairs, while the federal government would maintain responsibility for managing wolves in the national parks, and allow unregulated wolf killing in the predatory zone).

²⁷¹ 2007 Rule, 72 Fed. Reg. at 6129.

²⁷² WYO. GAME & FISH COMM'N, *supra* note 145, at 15. For further discussion of unregulated nature of the predatory area, see *supra* note 136.

²⁷³ *Defenders of Wildlife*, 565 F. Supp. 2d at 1172.

²⁷⁴ *Id.* at 1174; 2007 Rule, 72 Fed. Reg. at 6129 (finding "state regulatory mechanisms in [predatory] areas are inadequate to prevent excessive human-caused mortality").

²⁷⁵ See 2008 Rule, 73 Fed. Reg. 10,514, 10,549–50 (Feb. 27, 2008).

²⁷⁶ See 16 U.S.C. § 1533(a)(1)(D) (2006).

²⁷⁷ 2008 Rule, 73 Fed. Reg. at 10,549.

²⁷⁸ 2007 Rule, 72 Fed. Reg. 6106, 6129 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17) (stating "[t]he above restrictions present the very real possibility that Wyoming would not be able to maintain its share of a recovered wolf population").

²⁷⁹ *Id.*

pairs surviving inside YNP, and ten in the rest of the state.²⁸⁰ In FWS's own hypothetical, those ten pairs are left vulnerable to a lethal array of unchecked killing techniques under predator status, while a mere three breeding pairs in Wyoming were afforded the more rigorous protection.²⁸¹ Indeed, as FWS also points out, the number of breeding pairs in YNP did fall below eight breeding pairs in 2005, making FWS's hypothetical a frighteningly plausible reality.²⁸²

The seven or fifteen test remains in the 2007 plan, with the added assurance that Wyoming would maintain fifteen pairs statewide at all times.²⁸³ Moreover, wolves in YNP and GTNP fall within the jurisdiction of federal managers, even after delisting.²⁸⁴ Thus, Wyoming's plan makes a promise it cannot keep.²⁸⁵ FWS's decision to take at its word an uncooperative state, whose governor has all but endorsed killing each wolf outside the national parks, is inadequate.²⁸⁶ The ESA does not allow FWS to rubber stamp non-binding "certifications"; rather, the Service must independently review the entire mosaic of state protections against the rigid requirements of the ESA and the 1994 EIS.²⁸⁷ In fact, other Wyoming statutes, which trump the non-binding language of the 2007 plan, illuminate the true intent of the state's regulatory mechanisms.²⁸⁸ State law instructs the Wyoming Game & Fish Commission ("WGFC") to set take-limits for public wolf hunts only as necessary to reasonably assure that at least seven breeding pairs remain outside the national parks, and to adjust the boundaries of the trophy area at its discretion.²⁸⁹ At a minimum, the statute unmasks Wyoming's intention to rely on the federal government's ability to maintain eight breeding pairs within YNP and GTNP to ensure preservation of fifteen breeding pairs.²⁹⁰ Given that the parks failed to support eight pairs as recently as

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ WYO. GAME & FISH COMM'N, *supra* note 145, at 10; Defendants' Brief, *supra* note 194, at 14.

²⁸⁴ 2007 Rule, 72 Fed. Reg. at 6131 (stating "[t]he potential success of [the Wyoming plan] . . . is greatly dependent on YNP having at least eight breeding pairs. However, recent experience tells us this is an unrealistic expectation").

²⁸⁵ *Id.*

²⁸⁶ See 16 U.S.C. § 1533(a)(1)(D) (2006); Miller, *supra* note 170, at A1.

²⁸⁷ See 16 U.S.C. §§ 1533(a)(1)(D), (f).

²⁸⁸ See, e.g., WYO. STAT. ANN. § 23-1-304(a) (2008).

²⁸⁹ *Id.*

²⁹⁰ *Id.*; 2007 Rule, 72 Fed. Reg. at 6129-31.

2005, the *Defenders of Wildlife* court rightfully held that this framework is an inadequate regulatory mechanism.²⁹¹

ii. FWS's Decision to Approve Wyoming's 2007 Management Plan Violates the *State Farm* Principle

Applying the *State Farm* principle, FWS's decision to approve the 2007 management plan is arbitrary and capricious.²⁹² Wyoming balked at both of FWS's 2003 demands: (1) to designate wolves as trophy game statewide; and (2) to cure the flawed numeric standards.²⁹³ In its zeal to delist wolves, FWS did not even provide a reasoned explanation for surrendering its rational rejection of the 2003 plan.²⁹⁴

To begin, the Service had been studying wolf habitat since the 1970s,²⁹⁵ and the argument that the GYA represents the majority of the state's optimal wolf habitat most likely did not dawn on the Agency in 2007.²⁹⁶ What's more, wolves occupied far more than the northwestern corner of Wyoming before human-caused extirpation in the nineteenth century.²⁹⁷ This so-called unsuitable habitat is land where wolves can live plentifully; more likely this is habitat where the humans do not want the wolves to survive.²⁹⁸ It is transparent that Wyoming desires to pen wolves into uninhabited federal lands and pawn off management responsibility of eight packs to the federal government, even if fewer than fifteen packs exist statewide.²⁹⁹ Yet, even if the court constructively accepted defendants' flawed argument that the minimal expansion of the trophy area is an adequate mechanism to ensure survival, the flexibility given to WGFC to shrink the area renders the improvement illusory.³⁰⁰ The Service's post hoc rationalizations in defense of its retreat

²⁹¹ See 16 U.S.C. § 1533(a)(1)(D); *Defenders*, 565 F. Supp. 2d at 1171.

²⁹² See 5 U.S.C. § 706(2)(A) (2006); *State Farm*, 463 U.S. at 41–44.

²⁹³ *Defenders of Wildlife*, 565 F. Supp. 2d at 1174.

²⁹⁴ *Id.*; see 2008 Rule, 73 Fed. Reg. 10,514, 10,549–50 (Feb. 27, 2008).

²⁹⁵ See 2008 Rule, 73 Fed. Reg. at 10,514–15.

²⁹⁶ See *id.*

²⁹⁷ Schulte, *supra* note 1, at 545–46.

²⁹⁸ See 2008 Rule, 73 Fed. Reg. at 10,557 (stating “[w]hile wolves historically occurred over most of the NRM DPS, large portions of this area are no longer able to support viable wolf populations or breeding pairs”).

²⁹⁹ WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I) (2007); 2007 Rule, 72 Fed. Reg. 6106, 6131 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17).

³⁰⁰ WYO. STAT. ANN. § 23-1-101(a)(xii)(B)(I); *Defenders of Wildlife*, 565 F. Supp. 2d at 1174 (holding “[t]his aspect of the Wyoming plan presents a metaphorical moving target”).

from its 2003 policies are unreasonable, and clearly merit reversal under the *State Farm* formula.³⁰¹

IV. THE 2009 RULE: SAME OLD DEFECTS, BRAND NEW PROBLEMS

Just two weeks after issuance of the injunction, FWS opened a comment period on another proposal to delist gray wolves.³⁰² Despite a brief suspension by the Obama administration, FWS delisted wolves in the NRM DPS on April 2, 2009, except in Wyoming where wolves remained listed under ESA Section 10(j) status.³⁰³ The same coalition of environmental groups that successfully invalidated the 2008 Rule in *Defenders of Wildlife v. Hall* filed suit challenging the 2009 Rule, in the same court before the same judge.³⁰⁴ This Part argues that the 2009 Rule repeats the same errors as the 2008 Rule, while introducing several new defects, and like its predecessor must be invalidated as arbitrary and capricious.³⁰⁵ After a brief synopsis of the 2009 Rule, this Part shows that FWS failed to demonstrate sufficient scientific evidence of genetic linkage among the subpopulations, as required by the recovery criteria in the Agency's own 1994 EIS.³⁰⁶ Moreover, the ESA forbids FWS to continually rely on human-assisted genetic exchange after delisting.³⁰⁷ Like the 2008 Rule, the 2009 Rule is defective on the grounds that the Idaho and Montana regulatory mechanisms are inadequate.³⁰⁸ Both states adopted wolf management plans that carry no legal force and adopted overbroad defense of property statutes that theoretically allow limitless wolf mortality.³⁰⁹ Finally, this Part concludes that the 2009 Rule further contravened the inviolate language of the ESA by (1) simultaneously designating and delisting the NRM DPS; and (2) making a listing distinction within a DPS, a practice barred by the U.S. Court of Appeals for the Ninth Circuit.³¹⁰

³⁰¹ *Defenders of Wildlife*, 565 F. Supp. 2d at 1174 (holding the decision is arbitrary and capricious because "[t]he Service here too decides without explanation"); see also *State Farm*, 463 U.S. at 41–44.

³⁰² 2009 Rule, 74 Fed. Reg. 15,123, 15,125 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

³⁰³ *Id.*; see Byron, *supra* note 45, at A1.

³⁰⁴ Plaintiffs' 2009 Complaint, *supra* note 29, ¶¶ 4–20.

³⁰⁵ See *infra* notes 311–425 and accompanying text.

³⁰⁶ See *infra* notes 312–339 and accompanying text.

³⁰⁷ See *infra* notes 340–349 and accompanying text.

³⁰⁸ See *infra* notes 350–375 and accompanying text.

³⁰⁹ See *infra* notes 350–375 and accompanying text.

³¹⁰ See *infra* notes 376–425 and accompanying text.

A. *The 2009 Rule: Genetic Exchange and Wyoming Problems Addressed*

The 2009 Rule, despite the admonishment from the *Defenders of Wildlife* court that dispersal alone cannot constitute genetic exchange, states "natural dispersal alone, even in the GYA, appears adequate to prevent genetic drift and inbreeding depression."³¹¹ This time, however, FWS also states that (1) wolves in the GYA and at least one Idaho wolf, the alpha male of the Greybull Pack have naturally interbred; (2) human-assisted migration has led to other genetic exchange; and (3) if genetic problems materialize post-delisting, Idaho and Montana will combat the diminution of GYA gene strength by continuing human-assisted genetic exchange.³¹²

FWS states that more sophisticated predictive modeling is "ongoing," but at the same time reveals that "subsequent" analysis of additional wolves in the GYA has documented "gene flow among the GYA and other recovery areas."³¹³ This subsequent documentation of genetic exchange appears comprised of three separate sources, none of which are published scientific papers: (1) an "ongoing" eight-page unpublished manuscript by vonHoldt and her original co-authors; (2) personal communications with vonHoldt; and (3) personal communications with another co-author.³¹⁴ VonHoldt reported to FWS, shaded from the sunlight of publication and peer review, that although some "long distance migrants" have bred with GYA wolves, no natural genetic connectivity exists between wolves in YNP and the other subpopulations.³¹⁵

Though FWS continues to assert, despite the contrary finding in *Defenders of Wildlife*, that actual genetic exchange was never required by the 1994 EIS,³¹⁶ the Service also touts a Genetics Memorandum of Understanding ("Genetics MOU") signed by Idaho and Montana FWS memorializing the promise of future human-assisted genetic exchange.³¹⁷ Notably, Wyoming, which contains the great bulk of YNP and

³¹¹ 2009 Rule, 74 Fed. Reg. 15,123, 15,133 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

³¹² *Id.* at 15,133–35, 15,175. Wolves captured and translocated into the GYA from the Sawtooth Mountains in central Idaho and parts of Montana also have bred with wolves in the GYA subpopulation, according to the 2009 Rule. *Id.* at 15,133, 15,175.

³¹³ *Id.*

³¹⁴ See 2009 Rule, 74 Fed. Reg. at 15,133–34; U.S. Fish & Wildlife Service.

³¹⁵ See *id.* at 15,133.

³¹⁶ *Id.* at 15,134 (stating "human assisted "[r]elocations of the mere presence of dispersing wolves was believed to be adequate proof of connectivity").

³¹⁷ *Id.*

the surrounding wilderness, refused to sign.³¹⁸ Separately, in response to the conclusion in *Defenders of Wildlife* that Wyoming's wolf management framework constituted an inadequate regulatory mechanism under Section 4(a)(1)(D), FWS functionally excises Wyoming from the scope of the 2009 Rule.³¹⁹ FWS packages several different decisions into its 2009 Rule: FWS identifies the same existing NRM DPS from the 2008 Rule and delists the NRM DPS, but at the same time retains the Section 10(j) status for wolves within the political boundaries of Wyoming.³²⁰

B. Lack of Connectivity

The 2009 Rule reproduces the very same violation of the 1994 EIS as the 2008 Rule by offering insufficient scientific proof of genetic exchange among the subpopulations.³²¹ The 2009 Rule's new citation to an unpublished manuscript from vonHoldt, and two personal communications with wildlife biologists, again fail to meet the ESA's threshold of the "best scientific and commercial data available."³²² The 2009 Rule also introduces new violations of the ESA, namely by relying on human-assisted genetic exchange as evidence of meta-population recovery in the NRM DPS sufficient to satisfy the ESA's rigid definitions.³²³

1. The 2009 Rule Shows Insufficient Evidence of Genetic Exchange and Violates ESA Section 4(b)(1)(A)

FWS's claim that it has met its burden, in the 2009 Rule, of demonstrating genetic exchange among Idaho and Montana dispersers and GYA wolves by the best scientific evidence is troubling.³²⁴ This is especially true where the peer-reviewed vonHoldt Study less than a year earlier showed no exchange.³²⁵ Yet, now FWS relies on an unpublished manuscript and personal communications with wildlife biologists to support a contrary finding.³²⁶ It is uncontroverted that courts grant agencies the greatest degree of deference where scientific and techni-

³¹⁸ *Id.*

³¹⁹ See *id.* at 15,123.

³²⁰ See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1168–72 (D. Mont. 2008); 2009 Rule, 74 Fed. Reg. at 15,123.

³²¹ See 2009 Rule, 74 Fed. Reg. at 15,133–35, 15,175–79.

³²² 16 U.S.C. § 1533(b)(1)(A) (2006); 2009 Rule, 74 Fed. Reg. at 15,133–34.

³²³ See 16 U.S.C. § 1531(b) (2006); see also 16 U.S.C. § 1532 (2006).

³²⁴ See *id.* § 1533(b)(1)(A).

³²⁵ vonHoldt et al., *supra* note 187, at 257.

³²⁶ See 2009 Rule, 74 Fed. Reg. at 15,133–34.

cal expertise is necessarily involved in the decision-making.³²⁷ In fact, an agency's decision pursuant to the ESA may permissibly be founded on the "best" scientific data even if the administrative record contains evidence for and against its decision.³²⁸

The vonHoldt Study's failure to provide evidence of three genetically linked subpopulations underpinned much of the order enjoining the 2008 Rule.³²⁹ FWS is now entitled to point to contrary scientific findings to reach the alternate conclusion.³³⁰ Courts may not award deference to the agency's technical expertise, however, if the ultimate decision is administered in an arbitrary and capricious fashion.³³¹ Under the APA, an agency decision is arbitrary and capricious if, inter alia, it "relied on factors which Congress has not intended it to consider."³³² Here, FWS did just that: it promulgated a final rule supported thinly by a non-peer-reviewed, unpublished manuscript, and two personal communications.³³³ The plain language of ESA Section 4(b)(1)(A) demands that FWS must rely on better science.³³⁴ FWS frustrates the purpose of a provision demanding the "best" scientific data by resting on unpublished data and private communication shielded from scrutiny by other biologists and the public.³³⁵ In other words, academics do not leave their best studies to sit unpublished or merely report them over the telephone, and thus FWS should not rely on such data.³³⁶ Moreover, the ESA commands that FWS support all listing decisions by reference to the best "scientific and commercial data available."³³⁷ FWS makes reference to private data, which is thus not "commercial," since only FWS was privy to its contents at the time FWS published the 2009 Rule.³³⁸ The data supporting FWS's finding of genetic exchange in the 2009 Rule is neither the best nor commercially available, and therefore,

³²⁷ Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1174 (9th Cir. 2004).

³²⁸ *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008).

³²⁹ *See Defenders of Wildlife*, 565 F. Supp. 2d at 1168-72.

³³⁰ *Id.*

³³¹ *Lands Council*, 537 F.3d at 993.

³³² 5 U.S.C. § 706(2) (A) (2006); *State Farm*, 463 U.S. at 43.

³³³ 2009 Rule, 74 Fed. Reg. at 15,133-34.

³³⁴ 16 U.S.C. § 1533(b)(1)(A) (2006).

³³⁵ *See id.*

³³⁶ *See id.*

³³⁷ *Id.*

³³⁸ *Id.*; see 2009 Rule, 74 Fed. Reg. 15,123, 15,133-34 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

it is arbitrary and capricious in light of Congress' intent in enacting Section 4(b)(1)(A) of the ESA.³³⁹

2. The Reliance on Continued Human-Assisted Genetic Migration Contravenes the Purpose of the ESA

FWS trumpets human-assisted migration of wolves into the GYA in two ways: (1) human-assisted migration has led to genetic exchange in the GYA; and (2) if GYA wolves remain genetically isolated after delisting, both Idaho and Montana signed the Genetics MOU pledging to continue human-assisted migration programs to strengthen the GYA gene pool.³⁴⁰ Problematically for FWS, the ESA only allows artificial mechanisms for recovery purposes, and will not tolerate delisting decisions contingent on continued human assistance.³⁴¹

Section 2(b) declares, *inter alia*, that the purpose of the ESA is to provide a program for the conservation of endangered species.³⁴² The ESA does recognize that conservation of listed species may be facilitated by artificial means³⁴³ and defines conservation to include "propagation, live trapping, and transplantation."³⁴⁴ Conservation is defined as "bring[ing] any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary."³⁴⁵ Therefore, as the U.S. Court of Appeals for the Ninth Circuit has affirmed, Congress, in passing the ESA, intended human-assisted migration and other artificial propagation measures only to "promote populations that are self-sustaining without human

³³⁹ See 16 U.S.C. § 1533(b)(1)(A); *State Farm*, 463 U.S. at 43.

³⁴⁰ 2009 Rule, 74 Fed. Reg. at 15,133-34.

³⁴¹ See 16 U.S.C. § 1531(b) (2006) ("The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species."); *see also* 16 U.S.C. § 1532 (2006) ("The terms 'conserve,' 'conserving,' and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.").

³⁴² *Id.* § 1531(b).

³⁴³ Section 10(j), under which gray wolves are classified, allows for reintroduction of an extinct species into its native habitat, which is inarguably an artificial measure. *See* 16 U.S.C. § 1539(j) (2006).

³⁴⁴ *Id.* § 1532(3).

³⁴⁵ *Id.*

interference.”³⁴⁶ As the court stated, “the ESA’s primary goal is to preserve the ability of natural populations to survive in the wild.”³⁴⁷ As such, delisting of gray wolves is premature because, as FWS acknowledges, the population likely still requires human-assisted migration to meet its own genetic recovery criteria.³⁴⁸ When artificial measures are still needed, the species must remain listed because the signature goal of conservation under the ESA is to obviate, not perpetuate, further recovery measures.³⁴⁹

C. Adequacy of the State Regulatory Mechanisms

Although the 2009 Rule’s exclusion of wolves within the political boundaries of Wyoming from delisted status creates its own legal difficulties, the state may no longer be the whipping boy upon judicial review of the adequacy of existing regulatory mechanisms under Section 4(a)(1)(D) of the ESA.³⁵⁰ Nonetheless, two problems render the Idaho and Montana regulatory mechanisms inadequate and militate in favor of invalidation of the 2009 Rule. First, the non-binding nature of the Idaho and Montana wolf management plans make their protections illusory.³⁵¹ Second, Idaho and Montana’s liberal defense of property (e.g., domestically owned animals) laws allow for de facto unregulated wolf killing.³⁵²

Assuming, for the sake of argument, that the Idaho and Montana wolf management plans are adequate to protect the future viability of gray wolves in the NRM DPS, the state legislatures did not enact the plans statutorily, and they do not carry the force of law.³⁵³ Therefore, the plans more resemble aspirational goals than regulatory mechanisms, and are not sufficient to justify delisting under ESA Section

³⁴⁶ See *Trout Unlimited v. Lohn*, 559 F.3d 946, 957 (9th Cir. 2009) (holding that rule downlisting a DPS of naturally-spawned and fishery-hatched Upper Columbia River steelhead from endangered to threatened was not arbitrary and capricious because the sophisticated rule provided adequate triggers to ensure that naturally-spawned steelhead remained listed, even hatchery-born steelhead became abundant such that ESA’s clear command to preserve natural populations was not contravened).

³⁴⁷ See *id.*

³⁴⁸ See 2009 Rule, 74 Fed. Reg. 15,123, 15,133–34 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

³⁴⁹ See 16 U.S.C. § 1532(3); *Trout Unlimited*, 558 F.3d at 957.

³⁵⁰ See *Defenders of Wildlife*, 545 F.Supp. 2d. at 1172–76; *infra* notes 409–425 and accompanying text.

³⁵¹ See Plaintiffs’ 2008 Complaint, *supra* note 156, ¶ 60.

³⁵² See Plaintiffs’ Reply Brief, *supra* note 217, at 5–7.

³⁵³ See Plaintiffs’ 2008 Complaint, *supra* note 156, ¶ 60.

4(a)(1)(D).³⁵⁴ The plans, respectively, were written by IDFG and MFWP.³⁵⁵ Both IDFG and MFWP make important promises: Idaho pledged to maintain a wolf population between 518 and 732 (the lower and upper bounds of the 2005 and 2007 levels), while Montana promised to support a biologically sustainable population.³⁵⁶ These are promises, however, that IDFG and MFWP do not have the legal authority to make.³⁵⁷ Rather, IFGC and the Montana Fish, Wildlife and Parks Commission ("MFWPC") each assume legal authority to set wolf mortality quotas and hunting seasons, and each are only legally bound to manage a 15-breeding pair and 150-wolf minimum.³⁵⁸ Both commissions are politically appointed.³⁵⁹ Although the IFGC and MFWPC both ratified their states' wolf management plans, they are not only free to depart from their recommendations, but have already done so.³⁶⁰

As an example, IFGC set a wolf mortality limit of 428 wolves after the 2008 delisting—about fifty percent of the state's wolf population.³⁶¹ If Idaho hunters met the quota, the state's wolf population would fall nearly 100 wolves below the 2005 population, despite IDFG's pledge in

³⁵⁴ See 16 U.S.C. § 1533(a)(1)(D) (2006); Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 60.

³⁵⁵ IDAHO DEP'T OF FISH & GAME, *supra* note 123, at 1; MONT. FISH, WILDLIFE, & PARKS DEP'T, *supra* note 115, at i.

³⁵⁶ IDAHO DEP'T OF FISH & GAME, *supra* note 123, at 1; MONT. FISH, WILDLIFE, & PARKS DEP'T, *supra* note 115, at 109.

³⁵⁷ See Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 60.

³⁵⁸ IDAHO DEP'T OF FISH & GAME, *supra* note 123, at 1, 29; MONT. FISH, WILDLIFE, & PARKS DEP'T, *supra* note 115, at xii. Suzanne Asha Stone of Defenders of Wildlife phrased it quite aptly in a press release criticizing IFGC's 2009 decision to set a fall hunt for 220 wolves:

Even if Idaho and Montana begin cautiously; the fact remains that there is absolutely no law or binding commitment in place that could stop them from decimating the population down to a mere 150 per state. . . . No other endangered species has ever been delisted at such a low population level and then immediately hunted to even lower unsustainable levels. This isn't wolf recovery; it's a rejection of responsible wildlife conservation principles.

Press Release, Defenders of Wildlife, Wolves Running Scared: Idaho Announces Plan to Eliminate at Least 22 Percent of Current Population (Aug. 17, 2009).

³⁵⁹ IDAHO DEP'T OF FISH & GAME, *supra* note 123, at 1, 29; MONT. FISH, WILDLIFE, & PARKS DEP'T, *supra* note 115, at xii.

³⁶⁰ See IDAHO DEP'T OF FISH & GAME, *supra* note 123, at 1; MONT. FISH, WILDLIFE, & PARKS DEP'T, *supra* note 115, at i; Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 60.

³⁶¹ Press Release, Idaho Fish & Game Comm'n, F & G Commission Adopts Wolf Hunting Rules (May 22, 2008). The IFGC set the quota at 220 wolves for the Fall 2009 hunt; however, the lower number may belie IFGC's true intent. See Phillips, *supra* note 130, at A5; see also *supra* note 130.

the wolf management plan to maintain wolves at least at 2005 levels.³⁶² Idaho's wolf management plan makes promises the IFGC refuses to keep, which renders FWS's reliance on the non-binding plans hollow.³⁶³ Therefore, these illusory promises are inadequate regulatory mechanisms to justify delisting under ESA Section 4(a)(1)(D), and as such, the 2009 Rule should be enjoined.³⁶⁴

Idaho's³⁶⁵ and Montana's applicable defense of property statutes impose no upper bound on the number of wolves that can be killed to protect domestic animals.³⁶⁶ These overbroad defense of property laws contain no safety valve that triggers more stringent regulation in the event that populations diminish below the 15-breeding pair and 150-wolf numeric minima.³⁶⁷ Like Wyoming's seven or fifteen criteria, these similarly limitless laws render the states' regulatory mechanisms inadequate under ESA Section 4(a)(1)(D).³⁶⁸ Idaho and Montana make promises that the controlling language of their state statutes fails to support.³⁶⁹ The defense of property laws create an avenue for unregulated, unlimited wolf killing by private citizens, and that should per se violate ESA Section 4(a)(1)(D).³⁷⁰ On their face, the laws sound unlikely to threaten the viability of wolves, but limitless killing, if carried to its theoretical maximum, would imperil the long-term viability of

³⁶² See IDAHO DEP'T OF FISH & GAME, *supra* note 123, at 1.

³⁶³ See *id.*; Press Release, Idaho Fish & Game Comm'n, *supra* note 361.

³⁶⁴ See 16 U.S.C. § 1533(a)(1)(D) (2006).

³⁶⁵ Idaho's laws are more troubling than those in Montana. Idaho's defense of property laws permit private citizens to kill wolves in a far broader range of situations than the current federal rules, including when wolves are worrying or annoying livestock. See IDAHO CODE ANN. § 36-1107(c) (2008) ("Wolves may be disposed of . . . when [they] are molesting or attacking livestock or domestic animals and it shall not be necessary to obtain any permit. . . . '[M]olesting' shall mean the actions of a wolf that are annoying, disturbing or persecuting, especially with hostile or injurious effect, or chasing, driving, flushing, [or] worrying . . . to domestic animals."). The federal implementing regulation allows a defensible taking only when a wolf is in the act of attacking a domestic animal. 50 C.F.R. § 17.84(n)(3) (The "act of attacking" is defined in the code as "actual biting, wounding, grasping, or killing of livestock or dogs, or chasing, molesting or harassing by wolves that would indicate to a reasonable person that such [activities] are likely to occur at any moment").

³⁶⁶ See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1) (2007), amended by Act of Apr. 17, 2009, ch. 294, 2009 Mont. Laws (prohibiting the feeding of certain wildlife); GRAY WOLF FINAL EIS, *supra* note 8, app. 9, at 42.

³⁶⁷ Plaintiffs' Reply Brief, *supra* note 217, at 6.

³⁶⁸ See 16 U.S.C. § 1533(a)(1)(D); 2007 Rule, 2007 Rule, 72 Fed. Reg. 6106, 6129 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17) (stating that the seven or fifteen criteria is inadequate under ESA scrutiny because it exposes wolves to unlimited human-caused mortality).

³⁶⁹ See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).

³⁷⁰ See 16 U.S.C. § 1533(a)(1)(D).

wolves in spite of numeric management commitments in the non-binding wolf management plans.³⁷¹ Because the laws allow theoretically unlimited wolf mortality, enforcement of the laws would have to be vigilant.³⁷² There were troubling signs, however, from the brief delisting period before the preliminary injunction in *Defenders of Wildlife*.³⁷³ In a particularly egregious example, Idaho state regulators construed the state's defense of property law to insulate from prosecution a horse owner who killed a wolf after chasing it more than a mile on a snowmobile.³⁷⁴ On paper and in practice, the state laws allow too many wolf mortalities and are inadequate to ensure their viability under ESA Section 4(a)(1)(D).³⁷⁵

D. DPS Designation and the Problem of Partial Delisting

Like the 2008 Rule, the 2009 Rule simultaneously designated an area encompassing Idaho, Montana, Wyoming and swathes of eastern Washington, Oregon and northern Utah as the NRM DPS—and then delisted that DPS in the same action.³⁷⁶ Unlike 2008, the 2009 Rule differentiates among gray wolves within the NRM DPS based on political boundaries: the same species is delisted in Idaho, Montana, Oregon, Washington, and Utah, but remains under Section 10(j) status in Wyoming because of the inadequacy of the state's regulatory mechanisms.³⁷⁷ There are two fundamental defects with the 2009 Rule stemming from the DPS designation.³⁷⁸ First, the plain language of the ESA and FWS's own articulated DPS policy appear to preclude simultaneous designation of a DPS and delisting.³⁷⁹ Second, the ESA expressly prohibits FWS from issuing listing decisions that make a finer distinction

³⁷¹ See *id.*; IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).

³⁷² See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).

³⁷³ See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).

³⁷⁴ Phillip Davies, *106 Wolves Have Been Killed in the Past 118 Days*, BIGNEWS.BIZ, July 17, 2008, <http://www.bignews.biz/?id=785225&keys=wolves-wolf-shot-killed>. Between delisting and the preliminary injunction, which reinstated ESA protections to gray wolves, Idaho, Montana, and Wyoming, exerting their full authority to manage wolves, killed at least 106 wolves in 118 days. *Id.*

³⁷⁵ See 16 U.S.C. § 1533(a)(1)(D); IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).

³⁷⁶ See 2009 Rule, 74 Fed. Reg. 15,123, 15,123 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17); 2008 Rule, 73 Fed. Reg. 10,514, 10,514 (Feb. 27, 2008).

³⁷⁷ 2009 Rule, 74 Fed. Reg. at 10,123; 2008 Rule, 73 Fed. Reg. at 10,514; see also *Defenders of Wildlife*, 565 F. Supp. 2d at 1172–76.

³⁷⁸ See *infra* notes 382–425 and accompanying text.

³⁷⁹ See *infra* notes 382–408 and accompanying text.

than listing a subspecies or DPS.³⁸⁰ Therefore, the 2009 Rule's surgical excision of Wyoming wolves from the scope of delisting, if not the designation of the DPS itself, is an arbitrary violation of the letter and spirit of the ESA.³⁸¹

1. FWS is Prohibited from Simultaneously Designating a DPS of a Species and Delisting that Species

A federal court has already rebuked FWS for wrongfully asserting that the ESA, without ambiguity, permits the agency simultaneously to designate and delist a DPS, but again the 2009 Rule continues the practice.³⁸² Not coincidentally, that case concerned the only other cluster of gray wolves in the coterminous United States.³⁸³ There, FWS issued a final rule³⁸⁴ ("Great Lakes Rule") that designated gray wolves in Michigan, Minnesota, and Wisconsin as the western Great Lakes DPS ("WGL DPS"), and delisted the WGL DPS.³⁸⁵ In 2008, in *Humane Society v. Kempthorne*, the U.S. Court of Appeals for the District of Columbia Circuit held that FWS erred in asserting that the "plain language" of the ESA allows FWS to use a DPS-designation as a delisting tool, or in other words simultaneously designate and delist a DPS.³⁸⁶ The court stated that the construction of the ESA is either silent or ambiguous on this issue, and thus, the question is novel.³⁸⁷ In light of the statutory ambiguity, the court vacated the Great Lakes Rule and remanded to FWS so that the Agency could study its statutory obligations.³⁸⁸ The D.C. Circuit asserted that if FWS was still convinced of its initial reading, it had to provide a reasonable explanation why the ESA permits simultaneous designation and delisting.³⁸⁹ FWS should have abandoned the practice because a close examination of the ESA's construction and its legislative

³⁸⁰ See *infra* notes 408–425 and accompanying text.

³⁸¹ See *infra* notes 382–425 and accompanying text.

³⁸² See *Humane Soc'y v. Kempthorne*, 579 F. Supp. 2d 7, 21 (D.C. Cir. 2008).

³⁸³ *Id.*

³⁸⁴ On the same day FWS promulgated the rule delisting gray wolves in the western Great Lakes, it also issued the 2008 Rule, designating the NRM DPS, and delisting the DPS. See *Humane Soc'y*, 579 F. Supp. 2d at 9 n.2.

³⁸⁵ Final Rule Designating the Western Great Lakes Population 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).

³⁸⁶ *Humane Soc'y*, 579 F. Supp. 2d at 20–21.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

history firmly implies that a DPS designation may not be used simultaneously as a delisting instrument.³⁹⁰

FWS either misconstrues or craftily inverts the congressional purpose behind the amendment to include DPSs within the scope of the species definition.³⁹¹ Congress included the term DPS only to add an additional tool to FWS's conservation palette, allowing the Service to list locally declining populations even when the broader taxonomic species does not qualify as endangered or threatened.³⁹² In the 2009 Rule, FWS offensively wields the DPS tool for the inverse of its original purpose—to reduce, rather than bolster protection of local populations.³⁹³ The 2009 Rule, as in the Great Lakes Rule, isolates relatively healthy subordinate units of the broader gray wolf species, even though wolves are functionally extinct outside of the Northwest and the Upper Midwest.³⁹⁴ This perverse use of the DPS tool openly contravenes the conservationist spirit of the ESA.³⁹⁵

Although the ESA clearly permits FWS to delist or reclassify a DPS, since a DPS is included within the term “species,”³⁹⁶ such uncontroverted authority hardly allows FWS to delist asymmetrically a different DPS than what it originally listed.³⁹⁷ As absurd as it sounds, however, FWS now claims the authority to delist a population that was never listed.³⁹⁸ In fact, ESA Section 4 contemplates that every five years the Secretary of Interior will engage in a two-tiered process by re-evaluating the status of each species (and DPS) on the list of endangered or threatened wildlife “which is in effect at the time of such review,” and subsequently consider the listed species for reclassification or delist-

³⁹⁰ See 16 U.S.C. § 1532(16) (2006); 16 U.S.C. § 1533(c)(2)(A)–(B) (2006).

³⁹¹ See 16 U.S.C. §§ 1532(16), 1533(c)(2)(A)–(B); *Humane Soc'y*, 579 F. Supp. 2d at 20–21.

³⁹² See 16 U.S.C. §§ 1532(16), 1533(c)(2)(A)–(B).

³⁹³ See 2009 Rule, 74 Fed. Reg. 15,123, 15,123 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17); Great Lakes Rule, 72 Fed. Reg. at 6052.

³⁹⁴ See 2009 Rule, 74 Fed. Reg. at 15,123; Great Lakes Rule, 72 Fed. Reg. at 6052.

³⁹⁵ See 16 U.S.C. § 1531(b) (2006) (stating that purpose of all provisions of the ESA is to conserve species).

³⁹⁶ *Id.* § 1533(c)(2)(B) (ordering the Secretary to review the “list [of endangered and threatened wildlife] . . . which is in effect at the time of such review” every five years, and to list, delist or reclassify species (including DPSs) that are no longer in need of protection in light of the Section 4(a) criteria); see also *id.* § 1533(a).

³⁹⁷ See *id.* §§ 1532(16), 1533(c)(2)(A)–(B); *Humane Soc'y*, 579 F. Supp. 2d at 17.

³⁹⁸ See 16 U.S.C. § 1533(c)(2)(A)–(B). Likewise, in such simultaneous DPS designation and delistings, the designated DPS has never been subjected to analysis under the five Section 4(a) factors, and thus, circumvents the ESA's procedural and analytical mandates. See *id.* § 1533(a)(1)(A)–(E).

ing.³⁹⁹ The plain language of the provision militates overwhelmingly in favor of the axiomatic proposition that Congress intended *listing* to be a precondition to *delisting*.⁴⁰⁰ Otherwise, the Secretary would not evaluate a list of endangered wildlife "in effect at the time of such review," but rather give new effect to the list for the purposes of skewing what Congress intended to be a symmetrical examination.⁴⁰¹

The plain language of the DPS amendment further argues against FWS's perverse interpretation.⁴⁰² As the D.C. Circuit noted with interest in *Humane Society*, Congress did not grant FWS authority to designate a DPS of all organisms.⁴⁰³ Rather, it only permits DPS classification of "vertebrate fish or wildlife," not plants or insects.⁴⁰⁴ Here, as the plaintiffs challenging the Great Lakes Rule argued, Congress's definitional choice must be read as a value judgment that certain charismatic fauna, keystone species like gray wolves and highly treasured fish species, deserve more recovery tools and greater protection than insects and plants.⁴⁰⁵ By claiming that it has the authority to wield the DPS tool to erode protection of gray wolves, FWS is forced to argue the untenable: that Congress empowered it with a tool to reduce protections for the bald eagle and Pacific salmon that it may not similarly use for the gnat or knapweed.⁴⁰⁶ In the end, the ESA's plain language and simple inferences reject FWS's implausible interpretation that listing is not a precondition to delisting.⁴⁰⁷ As such, the 2009 Rule should be invalidated because it violates the ESA by unsheathing the DPS for use as a delisting instrument.⁴⁰⁸

2. The ESA Precludes FWS from Issuing Listing Distinctions Within a DPS

FWS errs again by making a listing distinction within the NRM DPS, which is forbidden by the ESA.⁴⁰⁹ The U.S. Court of Appeals for the Ninth Circuit, which includes the District of Montana, held in 2009

³⁹⁹ See *id.* § 1533(c)(2)(A)-(B).

⁴⁰⁰ *Id.*

⁴⁰¹ See *id.*

⁴⁰² See *id.* § 1532(16).

⁴⁰³ *Id.*; *Humane Soc'y*, 579 F. Supp. 2d at 17.

⁴⁰⁴ 16 U.S.C. § 1532(16).

⁴⁰⁵ See *id.*; *Humane Soc'y*, 579 F. Supp. 2d at 17.

⁴⁰⁶ See 16 U.S.C. § 1532(16).

⁴⁰⁷ See *id.*; 16 U.S.C. § 1533(c)(2)(A)-(B) (2006).

⁴⁰⁸ See 16 U.S.C. § 1532(16); *id.* § 1533(c)(2)(A)-(B); 2009 Rule, 74 Fed. Reg. 15,123, 15,123 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

⁴⁰⁹ See *Trout Unlimited*, 559 F.3d at 961; *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1161-62 (D. Or. 2001), *aff'd*, 319 F. App'x. 588 (9th Cir. 2009).

that FWS may not issue listing (or delisting) "distinctions below that of subspecies or a DPS of a species."⁴¹⁰ This controlling Ninth Circuit authority affirmed a decision by the U.S. District Court for the District of Oregon in *Alsea Valley Alliance v. Evans* that invalidated as "arbitrary and capricious" a National Marine and Fisheries Service ("NMFS") final rule listing "naturally spawned" coho salmon as threatened in the Oregon Coast DPS, while at the same time delisting nine hatchery populations within the same DPS.⁴¹¹ The Oregon district court, constraining NMFS's authority to the plain language of the ESA's definition of species,⁴¹² stated that the ESA only permits listing (and delisting) of an "entire species, subspecies or [DPS] of any species."⁴¹³ Because NMFS considered more particularized listing criteria than the ESA allowed, the Oregon district court held the rule arbitrary and capricious.⁴¹⁴

In light of *Alsea*, the 2009 Rule patently parses a listing distinction below the DPS definition, and thus arbitrarily relied on factors that Congress did not intend it to consider.⁴¹⁵ The 2009 Rule clearly distinguishes within the NRM DPS between wolves in the political boundaries of Wyoming (which remain listed) and wolves in the rest of the DPS (which are delisted), and as such violates the ESA.⁴¹⁶ Although the Ninth Circuit considers the listing distinction within the NRM DPS dispositive proof of the arbitrary and capricious nature of the 2009 Rule, there are other statutory and prudential reasons that militate against partial delisting.⁴¹⁷ First, the ESA's definition of "endangered" includes species "in danger of becoming extinct within a significant portion of its range."⁴¹⁸ Some scholars argue that courts must interpret this to

⁴¹⁰ See *Trout Unlimited*, 559 F.3d at 960–61 (quoting *Alsea*, 161 F. Supp. 2d at 1161) (holding in accord with *Alsea* that the National Marine and Fisheries Service may not list naturally spawned Upper Columbia River steelhead to the exclusion of hatchery born steelhead within the same DPS); *Alsea*, 161 F. Supp. 2d at 1161–62 (holding that "listing decisions below that of subspecies of a DPS of a subspecies are not allowed under the ESA").

⁴¹¹ *Alsea*, 161 F. Supp. 2d at 1161–62. The NMFS uses the term Evolutionary Significant Unit ("ESU"), but ESU and DPS are legally identical under the ESA and FWS and NMFS's joint DPS policy. *Id.*; see Policy on Applying the Definition of Species under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58612, 58613 (Nov. 20, 1991).

⁴¹² 16 U.S.C. § 1532(16) (any taxonomic species, subspecies and [DPS] of any species).

⁴¹³ *Alsea*, 161 F. Supp. 2d at 1162.

⁴¹⁴ *Id.* at 1161; see *State Farm*, 463 U.S. at 43 (stating an agency's decision is arbitrary and capricious if it "relied on factors which Congress has not intended it to consider").

⁴¹⁵ See *State Farm*, 463 U.S. at 43; *Alsea*, 161 F. Supp. 2d at 1162; 2009 Rule, 74 Fed. Reg. 15,123, 15,123 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

⁴¹⁶ 2009 Rule, 74 Fed. Reg. at 15,123.

⁴¹⁷ See 16 U.S.C. § 1532(6); *Alsea*, 161 F. Supp. 2d at 1159.

⁴¹⁸ 16 U.S.C. § 1532(6).

mean a species' historic range,⁴¹⁹ but upon judicial review of the 2009 Rule, a court need not even reach that decision.⁴²⁰ Wyoming wolves are non-abundant, genetically isolated, and are federally sheltered from a hostile state government that refuses to provide adequate regulatory protection.⁴²¹ Therefore, because Wyoming and the GYA inarguably make up a significant portion of the NRM DPS's range, and Wyoming wolves are in danger of extinction, the ESA, pursuant to its definition of "endangered," could not permit delisting.⁴²² Second, a prudential argument should be mounted to counter FWS's attempt to circumvent the ESA's proscription of listing decisions below a DPS.⁴²³ FWS charts too slippery a slope.⁴²⁴ What would be next—delisting decisions that carve out protections for specific counties or zip codes? It appears that upon judicial review, the U.S. District Court for the District of Montana should accord with the Ninth Circuit, and enjoin the 2009 Rule for arbitrarily violating the ESA's prohibition on listing distinctions within a DPS.⁴²⁵

CONCLUSION

In *Defenders of Wildlife v. Hall*, the Montana court rightfully enjoined FWS's 2008 rule delisting gray wolves in the NRM DPS. In its sprint to appease local anti-wolf and anti-ESA constituencies, FWS reversed its own guiding policies without a reasoned analysis and despite compelling scientific evidence to the contrary. The Agency's own recovery criteria demand numeric abundance and genetic connectivity among wolf populations in all three states—Idaho, Montana, and Wyoming. The GYA subpopulation (mostly in Wyoming), however, remained genetically isolated from the other packs. FWS also approved Wyoming's 2007 wolf management plan even though the state cured none of the patent inadequacies of its previously rejected plan. This action, too, was arbitrary and capricious, and proved fatal for the 2008 Rule. ESA Section 4(a)(1)(D) demands that prior to delisting, FWS appraise and guarantee the adequacy of state regulatory mechanisms. Not surprisingly, Wyoming's recalcitrant management scheme, which

⁴¹⁹ Dale D. Goble, *Recovery in a Cynical Time—With Apologies to Eric Arthur Blair*, 82 WASH. L. REV. 581, 610 (2007).

⁴²⁰ See 16 U.S.C. § 1532(6); *Defenders of Wildlife*, 565 F. Supp. 2d at 1172–76.

⁴²¹ See 16 U.S.C. § 1532(6); *Defenders of Wildlife*, 565 F. Supp. 2d at 1172–76.

⁴²² See 16 U.S.C. § 1532(6); *Defenders of Wildlife*, 565 F. Supp. 2d at 1172–76.

⁴²³ See 16 U.S.C. § 1532(16).

⁴²⁴ See *id.*

⁴²⁵ See *id.*; *Alsea*, 161 F. Supp. 2d at 1161–62.

allowed unregulated wolf killing in over ninety percent of the state, failed to pass muster.

In the remarkable dash to excise Wyoming and issue another delisting rule in 2009, FWS rationalized itself into a checkmate. To lawfully delist in accordance with *Alsea Valley Alliance v. Evans*, FWS would have to designate Wyoming as a separate DPS, because the ESA proscribes any distinction between the listing status of Wyoming and other wolves in the NRM DPS. To do this, Wyoming would have to satisfy the definition of a DPS under FWS's abiding policy, which mandates genetic and geographic "discreteness." Thus, a designation of Wyoming as its own DPS, by definition, would represent a concession that GYA gray wolves are genetically or geographically isolated by dint of a lack of dispersal. On the one hand, a designation of Wyoming as a DPS would effectively spell a violation of the 1994 EIS's genetic connectivity requirement. On the other hand, FWS's insistence that genetic exchange has occurred forestalls the ability to lawfully exclude Wyoming from any rule that delists wolves in the NRM DPS. That is precisely what FWS has done, however. The 2009 Rule delists the NRM DPS, with the exception of Wyoming, which violates *Alsea*. As such, the U.S. District Court for the District of Montana must again enjoin a defective FWS rule. This resolution would be just.

Going forward, FWS should require not just Wyoming, but also Idaho and Montana, whose wolf management plans are also flawed, to comport in good faith with ESA Section 4(a)(1)(D) before issuing another delisting. Moreover, FWS should wait until incontrovertible science demonstrates that wolves completed the genetic linkage required by the 1994 EIS. The population is almost viable, and anxious ranchers and politicians simply are required by the ESA to wait. Finally, never has an endangered species been subjected to aggressive human hunting just weeks after delisting; the juxtaposition is in puzzling tension with the recovery and conservation aims of the ESA. Doubtless, future management in the NRM DPS will require wolf harvests, but before ultimate delisting, FWS should secure legally-binding commitments that the states will issue far more restrained mortality quotas. Just a century ago, intolerant Westerners, with the blessing of bureaucrats in Washington, hunted wolves to extinction. This time, the ESA demands better.

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