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Dysfunctional Downlisting Defeated: Defenders of Wildlife v. Secretary, U.S. Department of the Interior

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DYSFUNCTIONAL DOWNLISTING
DEFEATED: DEFENDERS OF WILDLIFE V.
SECRETARY, U.S. DEPARTMENT OF
THE INTERIOR

EDWARD A. FITZGERALD *

Abstract: In 2003, the United States Department of the Interior (DOI) established three distinct population segments (DPSs) for the gray wolf, which encompassed its entire historic range. In addition, DOI downlisted the gray wolf from an endangered to threatened species in the Eastern and Western DPSs, despite the wolf’s continued absence from ninety-five percent of its historic range. The U.S. District Court for the District of Oregon properly invalidated DOI’s dysfunctional downlisting of the gray wolf. DOI’s interpretation of “significant portion of its range” was inconsistent with the text, intent, and purposes of the Endangered Species Act (ESA). In addition, DOI inverted its DPS policy, which provides different populations of the species different levels of protection in different portions of its historic range. Achieving the recovery plan goals did not warrant downlisting the gray wolf. DOI also failed to address the five downlisting factors of section 4(a) of the ESA across a significant portion of the gray wolf’s historic range. Nevertheless, DOI could have established two DPSs encompassing the populations of gray wolves in the western Great Lakes and northern Rocky Mountains, and could have accordingly downlisted these populations to threatened species status.

Introduction

As North America was settled, wolves and other predators were consciously exterminated.1 The Endangered Species Act (ESA) of 1973 protected the wolf and provided the means for its restoration across its historic range.2 In Minnesota, the sole remaining gray wolf

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population expanded into Michigan and Wisconsin. In the northern Rocky Mountains, gray wolves were reintroduced into Wyoming and Idaho, and naturally recolonized northwest Montana from Canada. Gray wolves were also reintroduced into New Mexico and Arizona. The restoration of the gray wolf in a small part of its historic range “is truly an endangered species success story.”

In 2003, the Department of the Interior (DOI) established three distinct population segments (DPSs) that incorporated the entire historic range of the gray wolf and downlisted the gray wolf in the Eastern and Western DPS to a threatened species. DOI built on the success in six states to downlist the gray wolf in much of its historic range across thirty states, despite the absence of the gray wolf from ninety-five percent of its historic range. Defenders of Wildlife (DOW) brought suit challenging DOI’s decision. In *Defenders of Wildlife v. Secretary, U.S. Department of the Interior*, the U.S. District Court for the District of Oregon found DOI’s action violated the ESA and its regulations. The court held that DOI misinterpreted the legal meaning of “significant portion of its range,” inverted its own DPS policy, and only analyzed the five downlisting factors across the gray wolf’s current range, not historic range.

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7 U.S. Fish and Wildlife Service (FWS) Director Rappaport Clark stated, “The [Endangered Species Act] gave us the tools we needed to achieve this milestone. We used the law’s protections and its flexibility to structure wolf recovery to meet the needs of the species and those of the people. This is truly an endangered species success story.” Press Release, U.S. Fish and Wildlife Service, Gray Wolves Rebound; U.S. Fish and Wildlife Service Proposes to Reclassify, Delist Wolves in Much of United States (July 11, 2000), available at http://www.r6.fws.gov/PRESSREL/00-18.htm [hereinafter Gray Wolves Rebound].
10 *Defenders of Wildlife*, 354 F. Supp. 2d at 1158.
11 Id. at 1170–71, 1174.
12 Id. at 1167, 1170–71.
This Article demonstrates that the federal district court’s decision in *Defenders of Wildlife* was correct. Part I of the Article provides an overview of the ESA, while Part II provides a brief history of the gray wolf in the United States. Part II also reviews DOI’s attempts to reintroduce the gray wolf into many regions of the country. Part III analyzes the legal meaning of “significant portion of its range,” DOI’s implementation of the DPS policy, the importance of recovery plans, and DOI’s consideration of the five downlisting factors. The Article asserts that DOI could have established two DPSs encompassing the core populations of gray wolves in the western Great Lakes and northern Rocky Mountains, and accordingly downlisted those populations to threatened species status. Subsequent litigation rejecting DOI’s abandonment of a Northeast DPS for gray wolves is reviewed. Part IV concludes the Article by examining DOI’s regulatory changes in the wolf recovery program following this litigation, as well as the House bill amending the ESA.

I. Overview: The Endangered Species Act

The Supreme Court described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”\(^\text{13}\) Congress recognized that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation,” while other species “have been so depleted in numbers that they are in danger of or threatened with extinction.”\(^\text{14}\) The ESA requires the Secretary of the Interior (SOI) to protect “species,” including “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife.”\(^\text{15}\) The ESA protects endangered species, defined as “any species which [are] in danger of extinction throughout all or a significant portion of its range,”\(^\text{16}\) and threatened species, which are “any species which [are] likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”\(^\text{17}\) Congress recognized that “these species of fish, wildlife, and plants are of esthetic, ecological, educa-


\(^{15}\)Id. § 1532(16).

\(^{16}\)Id. § 1532(6).

\(^{17}\)Id. § 1532(20).
tional, historical, recreational, and scientific value to the Nation and its people.”

The listing process begins with a petition submitted by a concerned party. DOI has ninety days to determine if there is “substantial scientific or commercial information” to go forward. If there is substantial information, DOI has one year to determine whether to list the species and the range of its protection. Utilizing the best scientific evidence, DOI must determine if the species is facing “the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.” Each of these five factors is equally important. If the SOI finds that a species is adversely affected by one factor, the species must be listed as endangered or threatened. The same process is followed for the downlisting and delisting of the species.

Once the species is listed, the SOI must “develop and implement [recovery] plans for the conservation and survival” of the species, unless she “finds that such a plan will not promote the conservation of the species.” DOI equates recovery with conservation, which is defined as “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 [ESA] are no longer necessary.” The SOI is instructed to “give priority to those

18 Id. § 1531(a)(3).
19 Id. § 1533(3)(b)(3)(A) (citing 5 U.S.C. § 553 (2000), which states, “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).
20 16 U.S.C. § 1533(b)(3)(A). “Substantial information” is defined as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b)(1) (2003).
22 Id. § 1533(a)(1).
23 See 50 C.F.R. § 424.11(c).
24 Id.
25 Id. § 424.11(d); see also 90-day Finding on Petitions to Establish the Northern Rocky Mountain Distinct Population Segment of the Gray Wolf, 70 Fed. Reg. 61,770, 61,773 (Oct. 26, 2005).
27 Id. § 1532(3); 50 C.F.R. § 402.02 (defining recovery as “improvement in the status of listed species to the point at which listing is not longer appropriate under the criteria set out in [the ESA].”).
endangered species or threatened species, without regard to taxo-
nomic classification, that are most likely to benefit from such plans.28

Once listed, a species is afforded ESA protection.29 Section 7 of
the ESA precludes any federal action that “jeopardizes the continued
existence of any endangered species or threatened species or results
in the destruction or adverse modification of designated critical habi-
tat.”30 The federal agency can only proceed with the project if author-
ized by the Endangered Species Committee.31 Section 9 prevents any
person from taking an endangered species.32 “Take” is defined as
“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or col-
lect, or to attempt to engage in any such conduct.”33 Section 4(d) per-
mits the SOI to adopt rules that allow for the taking of threatened
species under certain circumstances.34 Regulations issued under sec-
tion 4(d) are “usually more compatible with routine human activities
in the reintroduction area.”35

Section 10(j) permits the SOI to introduce an experimental
population of an endangered or threatened species, which is “wholly
separate geographically from nonexperimental populations of the
same species” and “outside the current range of such species, if the
SOI determines that such release will further the conservation of such
species.”36 Prior to the release, the SOI must decide “whether or not
such population is essential to the continued existence of an endan-
ergied species or a threatened species.”37 The experimental popula-
tion is treated as a threatened species, and is therefore subject to sec-
tion 4(d) regulation.38 Under section 7, a nonessential experimental
population is treated as a threatened species only when in a National
Park or National Wildlife Refuge.39 All federal agencies must consult

29 Id. § 1533(d).
30 Id. § 1536(a)(2).
31 Id. § 1536(e)(2).
32 Id. § 1538(a)(1)(B).
33 Id. § 1532 (19).
34 16 U.S.C. § 1533(d). The FWS regulations generally prohibit the taking of threat-
ened species. 50 C.F.R. § 17.31; see also Regulation for Nonessential Experimental Popula-
tions of the Western Distinct Population Segment of the Gray Wolf, 70 Fed. Reg. 1286,
1287 (Jan. 6, 2005).
35 Regulation for Nonessential Experimental Populations of the Western Distinct
37 Id. § 1539 (j)(2)(B).
38 See id.
39 Id. § 1539(j)(2)(C)(i).
with DOI to determine that their actions will not harm the species or its habitat.\(^{40}\) If outside a National Park or National Wildlife Refuge, a nonessential experimental population is treated as a species proposed for listing.\(^{41}\) Federal agencies must still confer with DOI to determine if their actions will jeopardize the species.\(^{42}\) However, the results of the conference are only advisory and do not restrict the agency from proceeding with the action.\(^{43}\) The agency within DOI responsible for implementation of the ESA is the U.S. Fish and Wildlife Service (FWS).\(^{44}\)

II. FROM DECIMATION TO REINTRODUCTION: A RECENT HISTORY OF THE GRAY WOLF IN THE UNITED STATES

At one time, the gray wolf occupied all of the continental United States, except the arid regions of California and the Southeast.\(^{45}\) The expansion of human settlement, the move westward, the growth of agriculture and the livestock industry, trapping and hunting, competition with hunters, and federal and state predator control led to the extermination of the wolf.\(^{46}\) By the 1970s, the gray wolf had been extirpated from more than ninety-five percent of its historic range.\(^{47}\) The only remaining substantial wolf population was located in Minnesota and Michigan,\(^{48}\) though wolves dispersed from Canada into the

\(^{40}\) Id. § 1539(j)(2)(A); Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf, 70 Fed. Reg. at 1287.


\(^{44}\) 50 C.F.R. 402.01(b) (2003). The Secretary of the Interior (SOI) is granted primary responsibility for implementing the ESA with respect to terrestrial species, while the Secretary of Commerce has the same responsibility with respect to marine and anadromous fish species. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(a). These responsibilities have been delegated to the FWS and the National Marine and Fisheries Service, respectively. 50 C.F.R. 402.01(b); see also Jason M. Patlis, Recovery, Conservation, and Survival Under the ESA, 17 PUB. LAND & RESOURCES L. REV. 55, 59 n.10 (1996).

\(^{45}\) The Southeast was inhabited by the red wolf. For an overview of the red wolf controversy, see Edward A. Fitzgerald, Seeing Red: Gibbs v. Babbitt, 13 VILL. ENVTL. L.J. 1, 4 (2002).

\(^{46}\) Fitzgerald, supra note 6, at 11–19.


\(^{48}\) Id.
northern Rockies. Following the enactment of the ESA in 1973, various subspecies of the gray wolf were granted protection: the northern Rocky Mountain wolf in 1973, the eastern timber wolf in 1974, the Mexican gray wolf in 1976, and the Texas gray wolf in 1976. In 1978, the FWS moved away from subspecies protection and listed the gray wolf as an endangered species throughout the continental United States, except in Minnesota where the wolf was downlisted to a threatened species.

The FWS recognized the importance of subspecies distinctions; therefore, recovery plans and management decisions continued to focus on subspecies. The FWS completed a recovery plan for the eastern Timber wolf in 1978, which was revised in 1992; for the northern Rocky Mountain wolf in 1982, which was revised in 1987; and for the Mexican wolf in 1982. In 1994, the FWS considered a proposal to develop a national recovery plan that would incorporate the three recovery plans and provide a national strategy for gray wolf recovery, but

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58 See generally U.S. FISH AND WILDLIFE SERV., MEXICAN WOLF RECOVERY PLAN (1982).
59 The FWS commissioned David L. Mech to create “A Comprehensive Recovery Strategy for the Gray Wolf in the 48 Contiguous States.” Mech concluded:

The Service has no national strategy or goal for the number and/or distribution of wolves that needs to be reestablished for its ESA responsibility to be met. Nor is there any strategy/policy that would address the above major issues. Instead, the Service seems to be on the course of developing or modifying a recovery plan to cover every place wolves show up. This is a “strategy” of
this effort was abandoned. Meanwhile, the gray wolf prospered in the western Great Lakes region and exceeded recovery goals. Gray wolves from Minnesota migrated to northern Wisconsin and northern Michigan to form a Great Lakes meta-population. Gray wolves from Minnesota also dispersed to North and South Dakota, Illinois, and Missouri. The existence and identity of wolves in the Northeast, however, are unknown.

Gray wolves from Canada also recolonized northwest Montana. In addition, gray wolves were reintroduced into Wyoming and Idaho in 1995 and 1996 as nonessential experimental populations pursuant to section 10(j) of the ESA. Subsequently, the Wyoming Farm Bureau brought suit challenging their reintroduction. The U.S. District Court for the District of Wyoming held that the reintroduction of wolves into Wyoming and central Idaho violated section 10(j) of the ESA. However, the U.S. Court of Appeals for the Tenth Circuit reversed, and found the potential occurrence of an individual naturally dispersing wolf in the experimental area did not violate section 10(j) because an individual dispersing wolf did not constitute a popula-


60 Id. at 9–11, 46–49.
63 Defenders of Wildlife, 354 F. Supp. 2d at 1167.
64 See id.
66 Id. at 15,806 (citing Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park, 59 Fed. Reg. 60,252, 60,266 (Nov. 22, 1974)).
67 Wyo. Farm Bureau Fed’n v. Babbitt, 987 F. Supp. 1349, 1355–58 (D. Wyo. 1997). The National Audubon Society filed a second complaint, alleging that the demotion of the naturally occurring wolves in the experimental population area from endangered to threatened violated the ESA. Id. The Urbigkis, a couple who studied Yellowstone wolves, filed a third complaint, asserting that the Environmental Impact Statement failed to discuss the impacts of reintroduction on the naturally occurring subspecies of wolves in Yellowstone, canis lupus irremutus. Id.
68 Id. at 1376.
Dysfunctional Downlisting Defeated

The court upheld the FWS determination that the experimental population was “wholly separate geographically” from the natural population, and was released outside “the current range” of the natural population. The Tenth Circuit also found that the SOI could treat all wolves in the experimental population area as part of the experimental population. This would help achieve recovery and avoid law enforcement problems. Since this litigation, wolves in the northern Rockies have exceeded recovery goals.

Mexican wolves were reintroduced into the Blue Range Wolf Recovery Area in New Mexico and Arizona in 1998 as a nonessential experimental population. No recovery goals for downlisting were established. The New Mexico Cattlegrowers Association (NMCGA) brought suit challenging the reintroduction of the Mexican wolf. The U.S. District Court for the District of New Mexico upheld the FWS decision. The court rejected NMCGA’s allegations regarding the livestock depredation rates, the hybridization of the reintroduced population, the existence of a naturally occurring Mexican wolf population, the impact on other endangered and threatened species, federal consultation with state and local governments, and the need for a Supplemental Environmental Impact Statement. The Mexican wolf population is expanding despite numerous obstacles.

In light of the success of wolf recovery, DOI issued a Proposed Rule on July 13, 2000 that established four DPSs in the western Great Lakes, Northeast, West, and Southwest and downlisted the gray wolf from an endangered to threatened species throughout most of its his-

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69 Wyo. Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1236 (10th Cir. 2000).
70 Id. at 1235–36.
71 Id. at 1237.
72 Id. See generally Fitzgerald, supra note 4.
75 See Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1752, 1754 (Jan. 12, 1998). The goal of the reintroduction program was to have at least 100 Mexican wolves occupying 5000 square miles. Id.
77 Id. at *5.
toric range, except the Southwest. Secretary of the Interior, Bruce Babbitt, declared:

Wolves are living symbols of the regard Americans have for things wild. We as a people have made the choice to do the right thing and bring these animals back from the brink of extinction. We have weighed the cost of saving an irreplaceable part of our world and found it to be worth our effort.

The Final Rule, which was issued on April 1, 2003, established only three DPSs in the East, West, and Southwest and downlisted the gray wolves in the Eastern and Western DPSs. All the wolves in the western Great Lakes, specifically those in Michigan and Wisconsin, were reclassified as a threatened species. Gray wolves in the remaining Eastern DPS states, including those in the Northeast, were also downlisted. Wolves in the northern Rockies, including those in Montana and Idaho, were downlisted to threatened species, but the regulation regarding the nonessential experimental populations in Wyoming and Idaho remained in place. Gray wolves were downlisted in the remaining Western DPS states, including Washington, Oregon, California, Nevada, parts of Idaho, Montana, Utah, and Colorado. The downlisting of the gray wolf to threatened species status permitted their taking pursuant to section 4(d) regulations and moved the gray wolf one step closer to delisting. The gray wolf was delisted in fourteen southeastern and mid-Atlantic states because the region was not part of the gray wolf’s historic range. Gray wolves in the Southwest DPS retained their endangered species status. On the

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81 Gray Wolves Rebound, supra note 7.
83 Id.
86 Id. at 15,830.
87 Id. at 15,826.
88 Id. at 15,804.
89 Id.
same day, DOI issued an Advanced Notice of Proposed Rulemaking, which announced its intention to pursue the delisting of the gray wolf in the Eastern and Western DPS and the removal of all nonessential population designations in the northern Rocky Mountains. Secretary Norton stated, “Thirty years ago, the future of the gray wolf in the United States outside of Alaska was anything but certain. Today we celebrate not only the remarkable comeback of the gray wolf, but the partnerships, dedicated efforts and spirit of conservation that have made this success story possible.”


Defenders of Wildlife (DOW), representing nineteen environmental groups, brought suit challenging the downlisting of the gray wolf across much of its historic range in the Eastern and Western DPSs. The U.S. District Court for the District of Oregon, in Defenders of Wildlife v. Secretary, U.S. Department of the Interior, held in favor of DOW. The court determined that the Secretary of the Interior’s (SOI) interpretation of “significant portion” of the gray wolf’s range was contrary to the ESA and case law. The SOI’s implementation of the DPS policy violated DOI’s own regulation, as well as the ESA. Since the SOI’s analysis was limited to the gray wolf’s current range, her conclusions regarding the five downlisting factors set forth in section 4(a) of ESA were invalid. As a result, the gray wolf remains an endangered species in the continental United States, except in Minnesota and the experimental population areas located in Wyoming, Montana, Idaho, Arizona, New Mexico, and Texas, where it is classified as a threatened species.

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91 News Release, U.S. Fish and Wildlife Service, supra note 84. Steve Williams, FWS Director, announced: “The north woods of Minnesota, Wisconsin and Michigan are healthier ecosystem because of the presence of wolves. These animals provide a living laboratory to study how a top predator affects plants and animals within the entire ecosystem.” Id.
93 Id. at 1174.
94 Id. at 1168.
95 Id. at 1170–71.
96 Id. at 1172.
A. Defining “Significant Portion of Its Range”

The ESA defines a species—including subspecies—as endangered if it is “in danger of extinction throughout all or a significant portion of its range.”98 A species is threatened if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”99 The U.S. Fish and Wildlife Service (FWS) limited its analysis to the gray wolf’s current range—the western Great Lakes and northern Rockies—even though wolves live outside the core areas.100 The FWS defined “significant portion of its range” as “that area that is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the taxon to persist into the foreseeable future.”101 The FWS concluded that “the presence or absence of gray wolves outside of core recovery areas is not likely to have a bearing on the long-term viability of the three wolf populations,”102 such that threats to the species outside core areas in the western Great Lakes and northern Rockies did not have to be evaluated.103

In Defenders Of Wildlife, the court rejected DOI’s interpretation, finding the gray wolf “extinct throughout a significant portion of its range [because] there are major geographical areas in which it is no longer viable but once was.”104 The court held that there are major geographic areas outside the western Great Lakes and northern Rockies in the historic range of the gray wolf that still can provide a suitable habitat for the species.105 The FWS acknowledged the existence of extensive potential wolf habitat in the Northeast—Maine, New Hampshire, and New York—and the Northwest—Washington and Oregon—and the dispersal of wolves to North and South Dakota.106


99 Id. § 1532(20).
100 Defenders of Wildlife, 354 F. Supp. 2d at 1167.
101 Id. at 1164.
103 Id. at 1169 (citing Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,825).
104 Id. at 1167 (citing Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001)).
105 Id. at 1167.
106 Defenders of Wildlife, 354 F. Supp. 2d at 1161.
The court recognized that the SOI had broad discretion in determining what constituted a significant portion of the range because the term was not defined in the statute. Nevertheless, the SOI still had to explain why potential wolf habitat within the wolf’s historic range where the wolf could still survive did not constitute a significant portion of the gray wolf’s range. The existence of viable wolf populations in the western Great Lakes and northern Rockies did not render areas in the remainder of the gray wolf’s historic range insignificant. The court found that the SOI’s interpretation was contrary to legislative history and case law.

The court’s decision was consistent with the text, intent, and purposes of the ESA. The legislative history of the ESA shows congressional intent to narrow the focus of the ESA from a species facing worldwide extinction to a species facing extinction only in a significant portion of its range, and to extend ESA protection from endangered species to threatened species. The purpose of the statute is to protect not only endangered and threatened species, but also the ecosystems on which they depend. The FWS interpretation, which focused solely on the area significant to the taxon as a whole, was contrary to the ESA. Even the FWS recognized problems with its analysis. The FWS approach was not supported by the case law. Finally, significant portions of the gray wolf’s historic range can support gray wolf populations. The gray wolf could not be downlisted across its historic range because it was absent from ninety-five percent of its historic range.

1. Legal Meaning of “Significant Portion of its Range”

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court developed a two-step process regarding judicial review

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107 Id. at 1164.
108 Id. at 1167.
109 Id. at 1168.
110 Id.
111 Id. at 1159, 1166.
112 *Defenders of Wildlife*, 354 F. Supp. 2d at 1159, 1166.
113 See id. at 1166.
114 Id. at 1164, 1168.
115 See id. at 1166–67.
116 See id. at 1168.
117 Id.
of an agency’s legal interpretation. First, a court must determine “whether Congress has directly spoken to the precise question at issue.” If Congress has not addressed the issue, a court can “not simply impose its own construction on the statute.” Instead, the court must move on to the second step to determine “whether the agency’s answer is based on a permissible construction of the statute.” Justice Stevens, the author of *Chevron*, later declared that a “pure question of statutory construction [is] for the courts to decide [by] employing traditional tools of statutory construction,” which include the text, intent, and purposes of the statute. A court’s inquiry begins with the text of the statute, which has been enacted into law through the constitutionally prescribed process. The text, which is known to the litigants and the public, is the best evidence of legislative intent. Reliance on the text confines the court’s inquiry, increases the probability of obtaining judicial agreement in a particular case, and provides certainty and predictability in the law.

The term “significant portion of its range” is ambiguous. The U.S. Court of Appeals for the Ninth Circuit addressed this issue in *Defenders of Wildlife v. Norton* (*Norton-Lizard*), in which the plaintiff challenged the FWS’s refusal to list the flat-tailed horned lizard as an endangered species. The FWS determined that suitable habitat on public land ensured the lizard’s viability, despite threats to the species on private land. DOW argued that the lizard’s private land habitat constituted a significant portion of its range where its survival was in

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120 Id. at 842.
121 Id. at 843.
122 Id. at 842–45.
126 *Defenders of Wildlife v. Norton* (*Norton-Lizard*), 258 F.3d 1136, 1145 (9th Cir. 2001). This Article will refer to this case as *Norton-Lizard* in order to distinguish it from a second case with the same party names, but dealing with the ESA classification of the lynx. *See generally* *Defenders of Wildlife v. Norton* (*Norton-Lynx*), 239 F. Supp. 2d 9 (D.D.C. 2002).
127 Id. at 1140.
jeopardy. The Ninth Circuit did not find the text of the ESA illuminating. After examining the dictionary definition of extinction, the Ninth Circuit determined the phrase “significant portion of its range” to be an oxymoron because “extinction suggests total rather than partial disappearance.” The statutory language was “inherently ambiguous, as it appear[ed] to use language in a manner in some tension with ordinary usage.”

The Ninth Circuit in Norton-Lizard rejected the SOI’s interpretation that a species was only entitled to ESA protection if it “faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be within the foreseeable future” because it rendered the “significant portion of its range language” superfluous. The court followed “a ‘natural reading . . . which would give effect to all of [the statute’s] provisions.’” By equating “a significant portion of its range” with all of the gray wolf’s range, the SOI violated the rule. The Ninth Circuit concluded that species could be extinct “throughout . . . a significant portion of range” if there are major geographic areas in which it is no longer viable but once was. The Ninth Circuit decision indicates that a species can have a different status in different portions of its range.

If the text does not answer the interpretative question, the court should examine the legislative history to discover the legislative intent, which is how the enacting legislature would have resolved the interpretative question. Studying the legislative history allows the court to properly defer to the legislature, and establishes criteria of reliability to help the court select and weigh elements of the language

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128 Id. at 1140–41.
129 Id.
130 Id. at 1141.
132 Norton-Lizard, 258 F.3d at 1141–42.
133 Id. at 1142 (quoting United Food & Commercial Workers Union Local 757 v. Brown Group, Inc., 517 U.S. 544, 549 (1996)).
134 Id. at 1141–42.
135 Id. at 1145 (quoting 16 U.S.C. § 1532(6) (2000)).
136 Id.
137 For a discussion on the existence of legislative intent, see Reed Dickerson, The Interpretation and Application of Statutes 68–69 (1975); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 642–50 (1990); Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 864 (1930); Tiefer, supra note 124, at 207–08.
in the legislative context. The two predecessor statutes of the ESA described endangered species as those facing complete extinction. The Endangered Species Preservation Act of 1966 defined an endangered species as one whose “existence is endangered because its habitat is threatened with destruction, drastic modification, or severe curtailment, or because of overexploitation, disease, predation, or because of other factors, and that its survival requires assistance.”

The Endangered Species Conservation Act of 1969 identified an endangered species as one which is threatened with “worldwide extinction.”

The Endangered Species Act of 1973 expanded the definition of an endangered species to one facing “extinction throughout all or a significant portion of its range.” The House Merchant Marine and Fisheries Committee stated that this major change represented “a significant shift in the definition in existing laws which considers a species to be endangered only when it is threatened with worldwide extinction.” The new language was added to encourage greater federal-state cooperation and grant the SOI greater flexibility regarding wildlife management.

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140 Norton-Lizard, 258 F.3d at 1144 (citing Endangered Species Conservation Act, Pub. L. No. 91-135 § 3(a), 83 Stat. 275 (1969)).


142 Norton-Lizard, 258 F.3d at 1144 (citing H.R. REP. No. 93-412, at 149 (1973)).

143 Senator Tunney, describing this as “perhaps the most important section of this bill,” declared:

The plan for Federal-State cooperation provides for much more extensive discretionary action on the part of the Secretary and the State agencies. Under existing law . . . a species must be declared “endangered” even if in a certain portion of its range, the species has experienced a population boom, or is otherwise threatening to destroy the life support capacity of its habitat. Such a broad listing prevents local authorities from taking steps to insure healthy population levels.


144 Id. at 1144. The American alligator was cited as an example that demonstrated Congress’s intended meaning of “significant portion of its range.” Id. The range of the alliga-
The ESA recognizes that different populations of the same species can have different status in different parts of its range. For example, grizzly bears were listed as threatened species within the forty-eight contiguous states, but not in Alaska.145 “[O]nly the California, Oregon, and Washington populations of the marbled murrelet, whose range in North America extends from the Aleutian Archipelago in Alaska to Central California, are listed as threatened.”146 The desert big horn sheep is only listed as an endangered species in peninsular ranges of southern California, although its range extends into Baja California.147 Only the population of Stellar sea lions occurring west of 144 degrees West longitude are listed as endangered species, while the remaining population is listed as threatened.148 Only the Florida population of the Audubon crested caracara, a hawk that ranges from Florida, southern Texas and Arizona, northern Baja California, and south to Panama, is listed as a threatened species.149 The piping plovers in the watershed of the Great Lakes are listed as endangered species, but are only a threatened species throughout the remainder of their range.150

There was an attempt to change the statutory text in 1978.151 Senator Bartlett proposed an amendment, which changed the “significant portion of its range” language to “the essential portion of its range.”152 Senator Bartlett was worried that the construction of the

An animal might be “endangered” in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction. In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills to insure the proper conservation of the species.

Id. (quoting Legislative History, supra note 143, at 360).

145 Id. at 1145.
146 Id.
147 Id.
148 Norton-Lizard, 258 F.3d at 1145.
149 Id.
150 Id.
151 Legislative History, supra note 143, at 1126.
152 Id.
Lukfata Dam on the Glover River in his home state of Oklahoma would be halted because it diminished the range of the Leopard Darter, an endangered species, by twelve percent.\textsuperscript{153} Senator Wallop offered an amendment incorporating Senator Bartlett’s language, which defined essential as “that portion of the range necessary for the continued survival and recovery of the species.”\textsuperscript{154} The Senate passed the amendment, but it was not accepted by the conference committee.\textsuperscript{155} The failure of Congress to adopt this amendment represents an explicit rejection of DOI’s definition of “significant portion of its range.”\textsuperscript{156}

There was also language in the 1978 House Merchant Marine and Fisheries Committee Report indicating that the term “range” refers to the “historical range” of the species.\textsuperscript{157} Section 4(c)(1) required the SOI to publish a list of endangered and threatened species and specify the portion of the range in which they were protected.\textsuperscript{158} The committee bill amended section 4(c)(1) to require the SOI to include critical habitat designations on endangered and threatened species lists.\textsuperscript{159} The committee stated that “[t]he term ‘range’ is used in the general sense, and refers to the historical range of the species.”\textsuperscript{160} The amendment was adopted by the conference committee.\textsuperscript{161}

Further guidance and clarification of statutory meaning are found in the statutory purposes.\textsuperscript{162} While more abstract in nature than the legislative intent, statutory purposes help the court to determine legislative intent, direct the court when legislative intent has

\textsuperscript{153} Id. at 1127.
\textsuperscript{154} Id. at 1129–1130.
\textsuperscript{156} See Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987); William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 84–89 (1988). The Supreme Court stated, “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.” Cardoza-Fonseca, 480 U.S. at 442–43.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
not been manifested, and allow the court to keep the statute in harmony with contemporary values.\textsuperscript{163} The ESA is concerned with the protection, conservation, and restoration of endangered and threatened species and the ecosystems on which they depend.\textsuperscript{164} Congress was particularly concerned with the protection of ecosystems.\textsuperscript{165} Congress found “[t]he two major causes of extinction are hunting and destruction of natural habitat.”\textsuperscript{166} The most crucial was the destruction of natural habitat.\textsuperscript{167} Congress recognized that the “critical nature of the interrelationships of plants and animals between themselves and with their environment . . . [demonstrates that the] ecologists’ shorthand phrase ‘everything is connected to everything else’ is nothing more than cold, hard fact.”\textsuperscript{168}

Congress mandated that the ecosystems be preserved to protect endangered and threatened species.\textsuperscript{169} The House Merchant Marine and Fisheries Committee stated: “As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable.”\textsuperscript{170} The ESA Amendments of 1982 stressed the importance of ecosystem conservation.\textsuperscript{171} The Senate Environment and Public Works Committee asserted that all taxonomic groups, even plants and invertebrates, should receive equal treatment under the ESA because they “form the

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\item[\textsuperscript{164}] 16 U.S.C. § 1531(b), (c) (2000). The declared purpose of the ESA is “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, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions . . . .” Id. § 1531(b); see also Jenness, \textit{supra} note 131, at 145.
\item[\textsuperscript{165}] S. Rep. No. 93-307 (1973), \textit{reprinted in Legislative History, supra} note 143, at 301.
\item[\textsuperscript{166}] Id.
\item[\textsuperscript{168}] H.R. Rep. No. 93-412 (1973), \textit{reprinted in Legislative History, supra} note 143, at 145.
\item[\textsuperscript{169}] See 16 U.S.C. § 1531(b).
\item[\textsuperscript{170}] H.R. Rep. No. 93-412, \textit{reprinted in Legislative History, supra} note 143, at 143. The House Report noted that “[f]rom the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.” Id. at 144.
\end{itemize}
bases of ecosystems and food chains upon which all other life depends. The Act’s stated purpose is to conserve ecosystems.”\textsuperscript{172} The conference committee noted that “individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element.”\textsuperscript{173} The conference committee declared that “the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.”\textsuperscript{174}

The ESA is designed to protect ecosystems,\textsuperscript{175} which are defined as “communit[ies] of organisms interacting with one another and with the chemical and physical factors making up their environment.”\textsuperscript{176} Ecosystems are comprised of individuals that are linked genetically with past, present, and future members of the same species.\textsuperscript{177} Individuals are members of species that have adjusted to different environmental conditions and are storehouses of information about how and why the species exists as it is, as a result of physical, chemical, and biological forces.\textsuperscript{178} Ecosystems provide matrices for the interaction and preservation of species.\textsuperscript{179} Given the vast array of interactions between species, ecosystems are greater than the sum of their parts.\textsuperscript{180}

All organisms rely on a healthy ecosystem, which depends upon the viability of species whose interactions regulate the system.\textsuperscript{181} There is a hierarchy within the ecosystem.\textsuperscript{182} Keystone species, which link other species to the food chain above and below themselves, in-

\textsuperscript{174} Id.; see also Daniel J. Rohlf, Six Biological Reasons Why the Endangered Species Act Doesn’t Work—And What to Do About It, 5 Conservation Biology 273, 275 (1991).
\textsuperscript{175} See 16 U.S.C. § 1531(b). Barry Commoner, in The Closing Circle, advanced four laws of ecology that are useful for understanding how ecosystems function, as well as the limits of humans in manipulating them: (1) everything is connected to everything else; (2) everything must go somewhere; (3) nature knows best; (4) there is no such thing as a free lunch. Zachary A. Smith, The Environmental Policy Paradox 2–4 (4th ed. 2004).
\textsuperscript{178} Id. at 5–6.
\textsuperscript{179} Id. at 6.
\textsuperscript{180} Id. at 5–6.
\textsuperscript{181} Id. at 14–15.
\textsuperscript{182} Id. at 14.
clude predator, prey, plants, links, and modifiers. All species are interconnected, so the removal of one keystone species can lead to population changes or severe physical disturbances. Disruptions in the ecosystem cause environmental instabilities that diminish nature’s ability to establish food chains, cycle nutrients, maintain air and water quality, control the climate, maintain the soil, dispose of waste, pollinate crops, and control pests and disease. Robert Costanza estimated the value of ecosystem services in the range of $16 to $54 trillion per year.

Ecosystem maintenance requires biodiversity, which is based on a diverse gene pool. The degree of complexity necessary for healthy maintenance is unknown. Paul and Anne Ehrlich equate the loss of species to the loss of structural rivets on an airplane—a dozen may never be missed, but the loss of the thirteenth might spell disaster. Predators, like the wolf, play an important role in the ecosystem. The wolf provides sustenance for the entire food chain. After wolves make a kill, other scavengers take their share, insects clean the carcass, and birds feed on the insects. The wolves also maintain the balance between predators. Wolves limit the coyote population,
which grows in their absence.\textsuperscript{194} This replenishes the coyote’s prey, mainly rodents, which feed predatory birds such as hawks, eagles, and owls.\textsuperscript{195} The reduction in the coyote helps the fox, which coexists with the wolf.\textsuperscript{196} The wolf keeps its prey in check, affects prey behavior, and increases the supply and diversity of plant life.\textsuperscript{197} This “top-down” effect, which is known as a trophic cascade, varies across ecosystems because of food web complexity, diversity, productivity, and other factors.\textsuperscript{198} The wolf helps to maintain the health of the ecosystem,\textsuperscript{199} which is one of the central purposes of the ESA.\textsuperscript{200}

2. DOI’s Analysis

The FWS failed to assess the threats to gray wolves across a significant portion of its range, which includes the suitable habitat within the gray wolf’s historic range.\textsuperscript{201} The FWS analysis was limited to gray wolf’s current range.\textsuperscript{202} The federal district court in \textit{Defenders of Wildlife} did not have to defer to the FWS definition regarding the significant portion of the range.\textsuperscript{203} The FWS definition, which was developed at a Marymount University meeting in 2000, was not part of the Proposed Rule or the Final Rule.\textsuperscript{204} The definition appeared for the first time during the litigation, so was therefore a post-hoc rationalization.\textsuperscript{205}

\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Enochs, \textit{supra} note 190, at 99.
\textsuperscript{197} See id.
\textsuperscript{198} Mark Hebblewhite et al., \textit{Human Activity Mediates A Trophic Cascade Caused By Wolves}, 86 Ecology 2135, 2135 (2005); \textit{see also} John Terborgh et al., \textit{The Role of Top Carnivores in Regulating Terrestrial Ecosystems}, in \textit{Continental Conservation: Scientific Foundations of Regional Reserve Networks} 39, 52–54 (Michael E. Soule & John Terborgh eds., 1999).
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 1164.
\textsuperscript{204} Id. at 1164–65.
\textsuperscript{205} Id. at 1165. In 2001, the U.S. Court of Appeals for the Ninth Circuit refused to accord any deference to the FWS’s decision, stating:

Accordingly, we owe the Secretary’s interpretation no deference under \textit{Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc}. As the D.C. Circuit ex-
After the Proposed Rule, but prior to the Final Rule, the Ninth Circuit rendered its decision in *Defenders of Wildlife v. Norton (Norton-Lizard)*, which defined the significant portion of the range as that area where the species once was but is no more.206 Despite the *Norton-Lizard* decision, the FWS determined that the significant portion of the gray wolf’s range was only its current range.207 Martin Miller, chief of the Branch of Recovery and Delisting in the FWS’s Endangered Species Program, explained that the “‘range’ in ‘significant portion of the range’ should be interpreted in most cases, and specifically for the gray wolf, as ‘current range.’”208 DOI argued that the FWS analysis was not based on the current range.209 Martin Miller later admitted that he did not know enough detail to realize whether he was mischaracterizing anything or missing something.210 The principal authors of the Final Rule, Ron Refsnider and Ed Bangs, disagreed with Miller’s conclusion and adopted the Marymount definition in the Final Rule, which was consistent with the Ninth Circuit’s decision.211

It is not relevant whether DOI relied on Miller’s current range or the Marymount definition in the Final Rule. In either case, the result was the same: the unit of analysis was the current range of the gray

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206 *Norton-Lizard*, 258 F.3d at 1145.
207 *Defenders of Wildlife*, 354 F. Supp. 2d at 1167.
208 Martin Miller stated in full:

I think we need to address why those areas (if any) where wolves may not be doing as well as other areas do not constitute SPRs [significant portions of its range]. I outlined a possible approach to addressing these issues for the gray wolf and why I think our determination should be that no areas constitute SPRs [significant portions of its range]. This required explaining why “range” in “significant portion of the range” should be interpreted in most cases, and specifically for the gray wolf, as “current range.”

211 Id.
wolf, not its historic range.\textsuperscript{212} Even Ron Refsnider, the author of the Final Rule, recognized problems with this approach. Refsnider noted:

\begin{quote}
We listed [the gray wolf] across the 48 states, yet we’re recovering it in only three portions of that listed range. Even if the recovery criteria for all 3 recovery plans are fully met, we’ll only have viable gray wolf populations in 5–10 percent of the historical range. Can we delist such a species under the 9th Circuit’s interpretation? We might be able to delist only in [Minnesota], [Wisconsin], the Upper Peninsula of Michigan, and parts of the Rockies.”\textsuperscript{213}
\end{quote}

The FWS could not downlist the gray wolf across its historic range because it was absent from a significant portion of its historical range.\textsuperscript{214}

\section*{3. Case Law}

The SOI’s definition of “significant portion of its range” was contrary to case law. The courts principally adopted a geographic or quantitative definition, and secondarily a functional definition, for “significant portion of its range.”\textsuperscript{215} DOI’s definition that the key factor determining the significant portion of the range was the relevance to the survival of the taxon as a whole was consistently rejected.

In \textit{Norton-Lizard}, the U.S. Court of Appeals for the Ninth Circuit dealt with the SOI’s refusal to list the flat-tailed horned lizard because sufficient public land habitat ensured the viability of the species.\textsuperscript{216} According to the SOI, a species can only be protected if it “faces threats in enough key portions of its range that the \textit{entire species} is in danger of extinction, or will be within the foreseeable future.”\textsuperscript{217} The SOI “assumes that a species is in danger of extinction in ‘a significant portion of its range’ only if it is in danger of extinction everywhere.”\textsuperscript{218} The Ninth Circuit determined that the SOI’s definition, which focused only on the risk of extinction to the taxon as whole, wrote the “significant portion of its range” language out of the stat-

\begin{itemize}
\item \textsuperscript{212} See Plaintiffs’ Response Memorandum, \textit{supra} note 208, at 11; Federal Defendants’ Reply, \textit{supra} note 210, at 14.
\item \textsuperscript{213} Plaintiffs’ Response Memorandum, \textit{supra} note 208, at 10–11.
\item \textsuperscript{214} \textit{Defenders of Wildlife}, 354 F. Supp. 2d at 1172.
\item \textsuperscript{215} Maranzana, \textit{supra} note 131, at 273.
\item \textsuperscript{216} \textit{Defenders of Wildlife v. Norton (Norton-Lizard)}, 258 F.3d 1136, 1141 (9th Cir. 2001).
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.}
\end{itemize}
The Ninth Circuit held “that a species can be extinct ‘throughout . . . a significant portion of its range’ if there are major geographic areas in which it is no longer viable but once was.” The FWS should have analyzed the status of the flat-tailed horn lizard on thirty-four percent of its historic range, which constituted a significant portion of its range.

In *Defenders of Wildlife v. Norton* (*Norton-Lynx*), the federal district court focused on the FWS determination of the significant portion of the lynx range. The historic range of the lynx was comprised of four regions: Northeast, Great Lakes, southern Rocky Mountains, and northern Rocky Mountains. After protracted litigation prompted administrative action, the FWS listed the lynx as a threatened species in a contiguous U.S. DPS, but the “Northeast, Great Lakes, and Southern Rockies do not constitute significant portion of the range of the DPS.”

The federal district court rejected the FWS decision to exclude a significant portion of the lynx range as “counterintuitive and contrary to the plain meaning of the ESA phrase ‘significant por-

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219 *Id.* at 1142.

220 *Id.* at 1145.

221 DOW cited other cases, which addressed whether the loss of a percentage of habitat constituted a significant portion of the species range. *Id.* at 1143. In *Federation of Fly Fishers v. Daley*, the federal district court found the listing of the steelhead trout was warranted despite protections encompassing sixty-four percent of its range. 131 F. Supp. 2d 1158, 1170 (N.D. Cal. 2000). In *Oregon Natural Resource Council v. Daley*, the federal district court found the listing of the steelhead trout was warranted despite protections encompassing sixty-four percent of its range. 6 F. Supp. 2d 1139, 1157 (D. Or. 1998). The FWS listed the Coachella Valley fringe-toed lizard as a threatened species, although fifty percent of its historical habitat remained. *Norton-Lizard*, 258 F.3d. at 1143. The U.S. Court of Appeals for the Ninth Circuit rejected DOW’s strictly quantitative approach and found there is no presumption in the ESA that a loss of predetermined amount of range qualifies for listing. *Id.* The percentage must be determined on a case by case basis. *Id.* If there was a bright line, Congress would have so stated. *Id.* at 1145.


223 Initially, the FWS refused to list the lynx. *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D.D.C. 1997). The federal district court in this case reversed the FWS decision. *Id.* The FWS’s claims—that real threats to the lynx must be shown in the lower forty-eight states before listing, and that there was no need to protect the lynx in the United States because adequate lynx existed in Canada and Alaska—were rejected by the court. *Id.* at 675, 684–85. After further investigation, the FWS found the lynx warranted listing, but listing was precluded because of other priorities. *Norton-Lynx*, 239 F. Supp. 2d at 15–16. The federal district court again forced the FWS to proceed. *Id.* at 26.

tion of the range.’”

The court held that the absence of the lynx in three of the four regions which comprise seventy-five percent of its historical range was a “noticeably or measurably large amount” of species range. The court held that the “FWS’s exclusive focus on one region where the lynx is more prevalent, despite its historic presence in three additional regions, is contrary to the expansive protection intended by the ESA.”

In *Southwest Center for Biological Diversity v. Norton*, the federal district court addressed the FWS analysis of the significant portion of the goshawk range. The FWS refused to list the goshawk as an endangered species over Vancouver Island, which constituted one third of its range, because there were viable populations on Queen Charlotte Island. The FWS asserted that the Vancouver Island population was not significant for the survival of the taxon as a whole. The federal district court found the loss of one third of the goshawk habitat was not crucial in itself, but Vancouver Island possessed the most suitable habitat for the goshawk. There was productive old growth forest which contained nineteen of the goshawk’s forty-three nesting areas. The court held that this rich habitat constituted a significant portion of the goshawk range, so the FWS had to analyze the status of the goshawk on Vancouver Island.

In *Environmental Protection Information Center v. National Marine Fisheries Service*, the federal district court reviewed the FWS determination of the significant portion of the green sturgeon’s range. The National Marine Fisheries Service (NMFS) discovered that the green sturgeon was not spawning in the South Fork Trinity River, the Eel River, and possibly the San Joaquin River. The green sturgeon population had declined by eighty-eight percent across its historic range. Despite the loss of spawning areas, the NMFS refused to con-

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225 Id. at 19.
226 Id.
227 Id.
229 Id. at *13.
230 Id. at *16.
231 Id.
232 Id.
233 Id. at *16–17.
235 Id. at 18.
236 Id. at 17.
sider whether the green sturgeon was a threatened species in a significant portion of its range.\textsuperscript{237} The federal district court found the decrease in spawning areas raised questions about the species viability in a significant portion of its range.\textsuperscript{238} Green sturgeons have a strong homing instinct.\textsuperscript{239} Green sturgeons not spawning in areas they once were might be dying out.\textsuperscript{240} The court determined that the NMFS did not qualitatively assess the impact of the loss of spawning grounds on the status of the green sturgeon.\textsuperscript{241} Nevertheless, the court specifically noted that the NMFS had to “focus on continued viability of the species . . . in a fixed geographical area that is part of [its] historical range.”\textsuperscript{242}

4. Other Significant Areas of Wolf Habitat

There are other significant areas within the historical range of the gray wolf that can support gray wolves.\textsuperscript{243} Scientific studies show there is suitable wolf habitat in the Pacific Northwest.\textsuperscript{244} Gray wolves have been sighted in Washington and Oregon.\textsuperscript{245} The northern Cascades and Selkirk Mountains in Washington have high potential for wolf recolonization because of their close proximity to the Canadian and northern Rocky Mountain wolf populations, as well as the prevalence of public lands.\textsuperscript{246} Other potential areas include Washington’s Olympic Peninsula, the Blue Mountains of southeastern Washington and northeastern Oregon, the Siskiyou Mountains of southern Oregon and northern California, and the northern Sierra Nevada Mountains in California.\textsuperscript{247} Studies demonstrate that 470 wolves can live in the complex of wildlands that include the Modoc Plateau of California and Oregon and the southern Oregon Cascades.\textsuperscript{248} Another recent study shows that Oregon can support 2200 wolves.\textsuperscript{249}

\begin{footnotesize}
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\item \textsuperscript{237} \cite{Id.} at 18.
\item \textsuperscript{238} \cite{Id.}
\item \textsuperscript{239} \cite{Id.}
\item \textsuperscript{240} \cite{Envtl. Prot. Info. Ctr., No. C-02–5401 EDL} at 18.
\item \textsuperscript{241} \cite{Id.} at 18.
\item \textsuperscript{242} \cite{Id.} at 19.
\item \textsuperscript{244} \cite{Id.}
\item \textsuperscript{245} \cite{Id.}
\item \textsuperscript{246} \cite{Id.}
\item \textsuperscript{247} \cite{Id.}
\item \textsuperscript{248} \cite{Id.}
\item \textsuperscript{249} \cite{State of the Wolf, supra} note 243, at 7.
\end{itemize}
\end{footnotesize}
The southern Rocky Mountains, which extend from south-central Wyoming to northern New Mexico, contain some of the best wolf habitat in the United States. This 41 million-acre region includes 25 million acres of public lands and has abundant elk and deer populations. The southern Rocky Mountains region contains one and a half times more public land than is available in the Greater Yellowstone Ecosystem, almost twice as much land as available in central Idaho, and six times the amount of public land available in the Blue Range Wolf Recovery Area (BRWRA) in Arizona and New Mexico. The region contains 1.7 to 25 times more public land than other sites considered for wolf restoration. The region contains roadless areas and wilderness, which equals seventy percent of the wilderness available to wolves in the Yellowstone area. It is equivalent to the amount of wilderness available to the wolves in central Idaho and about four times the amount of wilderness available to Mexican wolves in BRWRA.

The absence of wolves in the southern Rocky Mountains region represents a significant gap in the taxon. Since the region is equidistant from the northern Rockies and the BRWRA, the establishment of a southern Rocky Mountain wolf population would create “a spatially segregated population of wolves that extended from the Arctic to Mexico.” David Mech, a noted wolf expert, declared that “[southern Rocky Mountain] restoration could connect the entire North American wolf population from Minnesota, Wisconsin, and Michigan through Canada and Alaska, down the Rocky Mountains into Mexico. It would be difficult to overestimate the biological and conservation value of this achievement.”

FWS studies show the southern Rocky Mountains can support 1100 wolves. Potential gray wolf restoration sites include the Vermejo Park Ranch/Carson National Forest complex, the San Juan

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251 Id.
253 Id.
254 Id.
255 Id.
256 Id.
257 Id. at 244–45.
258 State of the Wolf, supra note 243, at 10.
Mountains, Rocky Mountain National Park, and the Gunnison National Recreation Area.\textsuperscript{259} There is also public support for wolf restoration in the region.\textsuperscript{260} The southern Rockies have been described as “the mother lode for wolves.”\textsuperscript{261}

There are additional areas in the Southwest that are amenable to wolves.\textsuperscript{262} These areas include the Sky Islands ecosystem in southern Arizona and New Mexico, the Apache Highlands (White Mountain and San Carlos Apache Reservations), and Big Bend National Park and Big Ben State Park in Texas.\textsuperscript{263}

The Northeast is another major geographic area that contains a suitable habitat to support wolves.\textsuperscript{264} The population of wolves across the Canadian border in Quebec and Ontario can serve as a source population for recovery in the Northeast.\textsuperscript{265} There have been unconfirmed reports of wolf sightings in the Northeast, which are suspected to be Canadian wolves.\textsuperscript{266} The FWS suggested the establishment of a separate Northeast DPS in the Proposed Rule.\textsuperscript{267} All of the peer reviewers who commented on the issue supported the establishment of the Northeast DPS.\textsuperscript{268} Researchers estimate that the region can support over 1000 wolves.\textsuperscript{269}

\section*{B. Distinct Population Segments (DPSs)}

The definition of “species” in the ESA includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when ma-
The ESA does not define “distinct population segment.” In 1996, the FWS and NMFS adopted a joint DPS policy for purposes of listing, reclassifying, and delisting vertebrate species under the ESA. A DPS is a group of vertebrate animals that is both discrete from and significant to the taxon as whole. According to this policy, the population is discrete if it is “markedly separate from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors,” or “it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of [section] 4(a)(1)(D) of the Act.” Complete isolation from other populations of its parent taxon is not a necessary condition of discreteness. State or other intra-national boundaries can not be used in determining the discreteness of a potential DPS. However, a state boundary can be utilized for the demarcation of the DPS when the state boundary incidentally separates two DPS that are considered to be discrete on other grounds.

The significance of the DPS is determined by its importance to the taxon as a whole. Indicators include, but are not limited to, “the use of an unusual or unique ecological setting; a marked difference in genetic characteristics; or the occupancy of an area that, if devoid of the species, would result in a significant gap in the range of the taxon.” If the population is both discrete and significant, it can

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271 See id. § 1532.
274 Id. at 4725
275 See id. at 4724.
276 See id. at 4723–24.
277 See id.
278 Id. at 4724.

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
be evaluated pursuant to the five criteria of section 4(a)(1) for listing, downlisting, or delisting. The FWS and NMFS recognized that the establishment of a DPS “may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an entire species or subspecies.” In the Final Rule, the FWS established the Eastern, Western, and Southwestern DPSs, which encompassed the historic range of the gray wolf. The FWS determined that the areas were discrete because the current populations were separated from one another by large unoccupied areas. There was no evidence of wolves migrating from one DPS to another DPS. The three DPSs were significant because the loss of

2. Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon,
3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.


283 Id. The Western DPS included California, Idaho, Montana, Nevada, Oregon, Washington, Wyoming, Utah north of U.S. Highway 50, and Colorado north of Interstate Highway 70. Id.

284 Id. at 15,818–19. The Southwest DPS consists of Arizona, New Mexico, Utah south of Highway 50, and Colorado south of Interstate Highway 70. Id.

285 See id. at 15,819.

286 Id. at 15,818–19. The FWS utilized the Canadian border for the DPSs because there is different wolf management in Canada. See id. at 15,849. There is an abundance of wolves in Canada; therefore, there is no federal protection for wolves, which are trapped in most provinces. See id. The situation is different in Mexico where there is a Mexican-U.S. bi-national wolf recovery program. See id. The southwest population covers the historic range of the Mexican wolf. Id. at 15,818–19.
any DPS would cause a significant gap in the range of the taxon. In addition, the gray wolf populations in the three DPSs did not share the same genetic characteristics, so they represented different reservoirs of diversity.

The federal district court in *Defenders of Wildlife v. Secretary, U.S. Department of the Interior* found the three DPSs inconsistent with the DPS policy and the ESA. The court determined that the DPS policy was designed to encapsulate a population whose conservation status differed from other populations of the same species. The FWS inverted this purpose to downlist large geographic areas. The FWS established three DPSs, but acknowledged that only the gray wolf populations in the western Great Lakes and northern Rocky Mountains were recovered. Other populations in the Northeast and Pacific Northwest were “tenuous or nonexistent.” Instead of isolating the distinct populations in the western Great Lakes and northern Rockies, the FWS extended the boundaries of these two core areas to include the entire historic range of the gray wolf. As a result, the conservation status of the population within each DPS varied from recovered to extinct.

The SOI’s implementation of the DPS policy involved a mix of legal and factual determinations. Generally, the court defers to an agency’s policy decisions because of agency expertise. Nevertheless, a court must perform a “thorough, probing, in-depth review” of agency action. The “hard look” doctrine requires the court to examine the agency action “to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore

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288 See id. at 15,819.
290 Id.
291 Id. at 1171.
292 See id. at 1170–71.
293 Id. at 1171.
294 See id.
296 Policy questions generally “reflect political choices—accommodation of competing interests, application of value choices, and responsiveness to the electorate—methods of decision making thought to be sharply distinguishable from the chief business of the courts, and hence owed great deference.” Christopher F. Edley, Jr., *Administrative Law, Rethinking Judicial Control of Bureaucracy* 34 (1990).
the ascertainable legislative intent.” 298 The court does not owe any deference to an agency when its action is inconsistent with statutory mandate. 299 There is no rational connection between the facts found and the choices made by the agency. 300 The agency ignores analysis of its own scientific experts without a credible explanation. 301 The agency decision, even if based on scientific expertise, is not well-reasoned. 302 The agency relies on factors Congress did not intend for it to consider. 303 The agency fails to consider an important part of the problem. 304 The agency refuses to consider data before it. 305 Rigorous judicial review “ensure[s] that the agency’s decision was a ‘reasoned’ exercise of discretion and not merely a response to political pressures.” 306 The FWS establishment of three DPSs, which encompass the entire historic range of the gray wolf, was inconsistent with the legislative intent, the DPS policy, and the case law.

1. Legislative History

The FWS interpretation of the DPS policy was inconsistent with the legislative history, which demonstrates a progressive narrowing of focus of ESA protection from species, to subspecies, to discrete population segments. 307 The Endangered Species Preservation Act of 1966 provided limited protection for certain species of fish and wildlife threatened with extinction. 308 There was no concern with subspecies or populations. 309 The Endangered Species Conservation Act of 1969 protected species and subspecies of wildlife threatened with world-

302 See Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001).
303 See O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 942 (9th Cir. 1996).
304 See Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43.
305 See Am. Tunaboat Ass’n v. Baldrige, 738 F.2d 1013, 1017 (9th Cir. 1984).
wide extinction.\textsuperscript{310} Congress was concerned with the limited scope of the statutes.\textsuperscript{311} The ESA of 1973 protected endangered species and threatened species through all or a significant portion of their range.\textsuperscript{312} Species were defined as “subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.”\textsuperscript{313}

The Endangered Species Act Amendments of 1978 established the current definition for a species as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreed when mature.”\textsuperscript{314} The conference committee explained that the new definition included “distinct populations” of vertebrate fish or wildlife.\textsuperscript{315} Other definitions that excluded subspecies and populations were offered, but rejected in the floor debates.\textsuperscript{316}

The Endangered Species Act Amendments of 1979 did not change the definition of species.\textsuperscript{317} The legislative history is informative because the DPS listing was the subject of debate. The General Accounting Office (GAO) suggested that the DPS listing be terminated because it could “result in the listing of squirrels in a specific city park, even though there is an abundance of squirrels in other parks in the same city, or elsewhere in the country.”\textsuperscript{318} The FWS and the NMFS opposed the GAO’s suggestion because “it would severely limit their ability to require the appropriate level of protection for a species based on its actual biological status.”\textsuperscript{319}

\begin{itemize}
\item \textsuperscript{310} Pub. L. No. 91–135, 83 Stat. 275 (1969); Gleaves et al., \textit{supra} note 309, at 27–28.
\item \textsuperscript{311} Pub. L. No. 93–205, § 3(4), 87 Stat. 884 (1973).
\item \textsuperscript{312} § 3(4), 87 Stat. at 885.
\item \textsuperscript{313} H.R. Rep. No. 93-740 (1973), \textit{reprinted in Legislative History, supra} note 143, at 426, 429.
\item \textsuperscript{315} The Conference Committee Report declares that the definition of species “includes subspecies of animals and plants, taxonomic categories below subspecies in the case of animals, as well as distinct populations of vertebrate ‘species.’” H.R. Rep. No. 95-1804 (1978), \textit{reprinted in Legislative History, supra} note 143, at 1208; \textit{see also} Gleaves et al., \textit{supra} note 309, at 30–31.
\item \textsuperscript{316} Gleaves et al., \textit{supra} note 309, at 31 n.28. See amendments offered by Representative Duncan and Senator Garn. \textit{Legislative History, supra} note 143, at 881–84, 1080–07.
\item \textsuperscript{318} S. Rep. No. 96-151 (1979), \textit{reprinted in Legislative History, supra} note 143, at 1396–97.
\item \textsuperscript{319} Id. at 1397. The FWS proceeded to state:
\end{itemize}
The Senate Committee on Environment and Public Works, rejecting the GAO proposal, declared:

[T]here may be instances in which FWS should provide for different levels of protection for populations of the same species. For instance, the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world. Similarly, listing of populations may be necessary when the preponderance of evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations.

Nonetheless, the committee is aware of the great potential for abuse of this authority and expects the FWS to use the ability to list populations sparingly and only when the biological evidence indicates that such action is warranted.320

The Endangered Species Act Amendments of 1982 did not change the definition of species, but were significant for several reasons.321 First, special provisions provided for the release of an experimental population of endangered or threatened species, which is “wholly separate geographically from nonexperimental populations of the same species.”322 Such a release can occur “outside the current range of such species if the Secretary determines that such release will further the conservation of such species.”323 This demonstrates that Congress was aware of the difference between the current and historical range of the species.324 Second, only biological categories could be utilized for the listing of “any species or subspecies of fish,

For instance, under the GAO proposal FWS would be required to provide the same amount of protection for the bald eagle population in Alaska, which is healthy, as for the bald eagle population in the coterminous states, which is endangered. One of the weaknesses of the 1969 act which was corrected in the 1973 amendments was the inability of the FWS to adopt different management practices for healthy, threatened or endangered populations.

Id. at 1396–97; see also Gleaves et al., supra note 309 at 32–33.
322 Id.
wildlife or plants and separate populations of vertebrate species."\(^{325}\)

Third, only biological information could support listing decisions.\(^{326}\)

The Endangered Species Act Amendments of 1988 did not change the definition of species, either.\(^{327}\) The House Merchant Marine and Fisheries Committee Report stated, "[a]ny species or subspecies of fish, wildlife, or plants may be listed. In addition, geographically distinct populations of vertebrate species may be listed."\(^{328}\)

2. DPS Policy

The FWS action was inconsistent with its own policy. The DPS policy focuses on discrete population segments, which are "markedly separated . . . as a consequence of physical, physiological, ecological, or behavioral factors [or] . . . delimited by international governmental boundaries."\(^{329}\) The DPS must be based on the best available scientific evidence,\(^{330}\) which includes dispersal distances and other limiting factors, such as significant mountain ranges, bodies of water, deserts, or major urban areas.\(^{331}\) The DPS policy expressly prohibits use of state boundaries to establish the DPS.\(^{332}\) The three DPSs established by FWS were not based on science.\(^{333}\) The FWS accumulated all of the states in the gray wolf’s historic range and divided them into three DPSs.\(^{334}\) Each DPS was too large and encompassed more territory than the gray wolves in the core areas would ever be able to reach or inhabit.\(^{335}\) The DPS boundaries were not based on biology, but on politics.\(^{336}\) Apparently, the FWS believed that this was "the best and

\(^{325}\) Gleaves et al., \textit{supra} note 309, at 35 (quoting H.R. Rep. No. 97-567 (1982)).

\(^{326}\) Id.


\(^{328}\) Gleaves et al., \textit{supra} note 309, at 36 (quoting H.R. Rep. No. 100-467 (1988)).


\(^{330}\) Id. at 4722.


\(^{334}\) Id. at 1170.

\(^{335}\) See id. at 1170, 1171–73.

\(^{336}\) Plaintiffs’ Memorandum in Support of Summary Judgment, \textit{supra} note 331, at 35. Several comments demonstrated the political nature of the FWS’s action. FWS Western Regional Coordinator Ed Bangs stated, “I think this [reclassification] is the best and quick-
quickest way to get the policy and legal framework greased for wolf delisting.”

In the Western DPS, the core wolf population in three states—Montana, Wyoming, Idaho—was on its way to recovery. Six other states in the Western DPS had few, if any, wolves. The FWS used the success in three core states to downlist the gray wolf in the other six states where its endangered status had not changed. The FWS’s own experts noted that the Western DPS was too large. The boundaries of the Western DPS were not based on natural limitations.

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est way to get the policy and legal framework greased for wolf delisting.” Id. at 44. In addition, Scott Johnston noted that “[t]wo significant events have shaped this rule: the June 1998 announcement by the Director and Secretary that indicated our intention to delist wolves in the Western Great Lakes; and, the Minnesota Legislature failing to approve a state management plan.” Id. Another commentator declared that to “[r]eclassify and subsequently delist Eastern Timber Wolf . . . [i]s[ ]probably the simplest and quickest approach.” Id. at 45.

337 Id.
339 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 19.
340 Id. at 19–21, 36.
341 Id. at 36. FWS peer reviewer Michael Phillips was quoted in the memorandum as stating:

I oppose the Service’s reliance on the 1987 Northern Rocky Mountain Wolf Recovery Plan . . . as the operative document for effecting wolf recovery in the west. It is inappropriate to apply delisting criteria that were originally developed for a 3-state region (i.e. Montana, Wyoming, and Idaho) and according to the Service’s own scientific review are only minimally acceptable . . . to the much larger 9-state western DPS. The proposed reclassification rule, however, indicates that the Service intends to do just that. . . . I recommend that the Service recognize that it is inappropriate to apply the recovery objectives that were developed for Montana, Wyoming, and Idaho to the much larger proposed Western DPS. Effecting wolf recovery in the proposed Western DPS according to such criteria is entirely unwarranted and has no basis in biology or law.

Id. Furthermore, Rolf Peterson, another FWS peer reviewer, stated:

The Northern Rocky Mountains Recovery Plan apparently established recovery criteria primarily with areas in just three states in mind, MT, ID, and WY. The recovery goal of [ten] breeding packs in each of the three recovery areas in these states is, I think, adequate for the original areas considered. However, I don’t believe there is an adequate basis for greatly enlarging the spatial scale for this Plan without a more thorough consideration of both spatial and numerical criteria.

Id. at 37. Brian Kelly, an FWS biologist, also said: “I think it [is]a great leap to claim all western states are recovered based on criteria developed for only 3 states in the N. Rockies.” Id.
or dispersal distances, which are generally 250 miles. FWS Western Regional Coordinator Ed Bangs acknowledged the massive size of the Western DPS when he declared there was no way that any gray wolves in the Western DPS would migrate below Interstate 70.

The Eastern DPS was also not based on biology. The Proposed Rule created two separate DPSs, one in the western Great Lakes and the other in the Northeast. The Final Rule combined both areas into the Eastern DPS. There was no way that the wolves in the western Great Lakes were going to migrate and populate the Northeast because the dispersal distance was too far and there were too many impediments. Even the FWS Eastern Timber Wolf Recovery Team criticized the Eastern DPS for being too large.

FWS experts supported the establishment of a separate Northeast DPS. Ron Refsnider, author of the Final Rule, stated that the FWS abandoned the Northeast DPS because of political pressure.

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342 Id. at 37.
343 Id. Ed Bangs commented on the Western DPS: “I still think there is no way a wolf will get South of I-70 on its own. [The] chances of a breeding pair getting there is zero. If the 4(d) rule [allowing for lethal take of wolves] gets done, it will be even less likely.” Id. Doug Smith, leading wolf biologist for Yellowstone National Park, criticized the FWS for overstating the amount of wolf dispersal among three northern Rocky Mountain wolf populations. Id. at 38.
344 Id. at 35.
348 Id. at 39. The Eastern Timber Wolf Recovery Team recommended a smaller DPS that included Minnesota, Michigan, Wisconsin, and states within a reasonable dispersal distance (North Dakota, South Dakota, Iowa, Illinois, Ohio, Indiana). Id.
349 Id. at 41. The Eastern Wolf Recovery Team noted that a smaller DPS “preserves future options for gray wolf in the Northeastern U.S. to be fully protected under the Endangered Species Act after wolf recovery in the Western Great Lakes area has been achieved.” Id. at 40.
350 Id. at 42. Ron Refsnider stated:

Instead we have this situation in which the former DTE Chief, FWS Director, [DOI] Secretary, and other decision-makers supported establishing a [Northeast] DPS through a rulemaking. They apparently thought it fit the DPS criteria (and some of them were very familiar with the criteria!), regardless of the lack of good evidence that gray wolves currently exist there. We spent 2 years developing and publicizing a national rule based on the premise that a NE DPS was justified and appropriate . . . . But with all those past decision-makers
2001, after the election of George W. Bush, the FWS amalgamated the Northeast DPS into the Eastern DPS. The FWS, noting internal disagreement regarding the issue, defended the abandonment of the Northeast DPS. The FWS asserted that a wolf population had to be present in the Northeast to establish a separate DPS. Furthermore, there was a real possibility that wolves in the Northeast were a different subspecies, possibly the red wolf, the Algonquin wolf, a coyote-hybrid, or another canine. Since there was no data on either the identity or existence of the wolf in the Northeast, a DPS could not be established. A threatened species listing for New York, New Hampshire, Maine and Vermont was retained to protect any wolf that might arrive and preserve the option of recovery. Due to uncertainty, the section 4(d) rule for the Eastern DPS did not apply east of Ohio.

The FWS downlisting of the gray wolf was questionable under either rationale. Wolves in the Northeast were either a different subspecies entitled to greater protection, which could not be amalgamated into a single DPS, or gray wolves whose absence in the region created a significant gap in taxon. Since the benefit of doubt goes to the species, the FWS should not have downlisted wolves in the Northeast.

The Southwest DPS, which extends beyond the historic range and dispersal distances of the reintroduced Mexican wolves, was also

and NE DPS supporters out of the picture, we are on the verge of losing the NE DPS because of largely internal opposition to the idea.

Id.

351 See id.

352 Federal Defendants’ Opposition to Plaintiffs’ Motion For Summary Judgement at 44–47, Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005) (No. 03-1348 JO) [hereinafter Federal Defendants’ Opposition]. Regions 3 and 5 pushed for a Northeast DPS, but Region 9 “strongly disagreed that designation was consistent with the DPS Policy, and everyone recognized that the decision had major implications for future application of the DPS Policy.” Id. at 46.

353 Id. at 45.

354 Id. at 45–46.

355 Id. at 45.

356 Id.

357 Id. at 45–46.

358 Federal Defendants’ Opposition, supra note 352, at 46.

359 Id. at 39–40, 45–47.

360 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 41.

too large and not based on scientific factors. Ed Bangs, FWS Regional Coordinator, noted that no Mexican wolves were getting above Interstate 70. Furthermore, the boundary established between the Western and Southwestern DPSs divided the southern Rockies ecosystem, which was identified by FWS experts as having some of the best remaining wolf habitat.

Finally, the FWS argued that all the areas in the gray wolf’s historic range must be included in the three DPSs. The FWS claim was based on a memo by Ron Refsnider. Neither the ESA nor the implementing regulations support the FWS position. The ESA contemplates a national species listing and a DPS for the unique treatment of smaller populations of gray wolves. Therefore, the DPS should be cut out of the historic range of the entire species and accorded unique treatment. It should not serve as a vehicle for downlisting the entire species.

3. Case Law

The courts have not supported the FWS position. In Norton-Lizard, the Ninth Circuit recognized that the ESA provided different levels of protection for different populations of the same species, such as the alligator, grizzly bear, marbled murrelet, desert big horn sheep, Stellar sea lion, Audubon crested caracara, and piping plover.

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362 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 43.
363 See id., at 37, 43–45.
364 Id. at 43. One comment in the administrative record states: “No other region in the U.S. offers that same potential to support a persistent population of wolves on public land . . . .” Id. Another comment notes that “the two areas left most appropriate to wolf recovery are the northeastern DPS (e.g. northern Maine) and the southern rockies (e.g. southern Colorado).” Id.
365 Id. at 33–34.
366 Plaintiffs’ Reply Memorandum, supra note 269, at 23. Refsnider stated in his memorandum that “the entire previously listed range (or the historical range, if the previously listed range erroneously went beyond the documented historical range) must be included in the resulting DPSs.” Id.
367 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 34–41.
368 Nat’l Ass’n of Homebuilders v. Norton, 340 F.3d 835, 842 (9th Cir. 2003) (discussing designation of the Arizona pygmy Owl as a DPS).
369 See id.
370 See id.
372 See id.
In *Friends of the Wild Swan v. U.S. Fish and Wildlife Service*, the federal district court rejected the FWS attempt to utilize the DPS policy as the means for avoiding ESA requirements.³⁷³ *Friends of the Wild Swan* petitioned to have the bull trout listed as an endangered species.³⁷⁴ Initially, the FWS determined that a national listing was warranted, but later changed its position.³⁷⁵ The FWS, relying on U.S. Forest Service and Bureau of Land Management actions, as well as state bull trout protection agreements, created five DPSs and did not grant the bull trout a national listing.³⁷⁶ The federal district court held that the failure of the FWS to list the bull trout and explain its adoption of five DPSs, which decreased the protection of the species, was arbitrary and capricious.³⁷⁷ The court noted that the DPS “is a proactive measure to prevent the need for listing a species over larger range—not a tactic for subdividing a larger population that [FWS] has already determined, on the same information, warrants listing throughout a larger range.”³⁷⁸

In *Defenders of Wildlife*, the federal district court recognized that the establishment of three DPSs for the gray wolf was similar to that of the bull trout.³⁷⁹ According to the court, the three DPSs “decreased the protection afforded to the species, even though the population status of wolf was not improved outside of the core recovery areas.”³⁸⁰ The DPS for the gray wolf, like those for the bull trout, “appears to be a tactic for downlisting areas the FWS has already determined warrants listing, despite the unabated threats and low to nonexistent populations outside of the core areas.”³⁸¹

### C. Recovery Plans

Once the species is listed, the FWS “must do far more than merely avoid the elimination of [the] protected species. It must bring these species back from the brink so that they may be removed from

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³⁷⁴ *Friends II*, 12 F. Supp. 2d at 1122.
³⁷⁵ *Id.* at 1123–24.
³⁷⁷ *Friends II*, 12 F. Supp. 2d at 1133–34.
³⁷⁸ *Id.* at 1133.
³⁸⁰ *Id.*
³⁸¹ *Id.*
the protected class . . .". The FWS must “develop and implement a recovery plan ‘for the conservation and survival of any threatened or endangered species’ that will benefit from such a plan.” The plan must contain site management actions, objective and measurable criteria for removing species from the list, and an estimate of the time required and costs to carry out the plan’s goals. The plan is “supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence. It is supposed to provide a means for achieving the species long-term survival in nature.”

The FWS developed three recovery plans for the gray wolf in the East, northern Rocky Mountains, and Southwest DPSs based on principles of conservation biology: representation, resiliency, and redundancy. The Eastern Recovery Plan covered a geographic area stretching from Minnesota to Maine to northeast Florida. The plan contained two listing criteria, which included at least two populations within the continental United States that met the following conditions: “(1) a Minnesota population that is stable or growing, and whose continual survival is assured and, (2) a second population outside of Minnesota and Isle Royale, having at least 100 wolves in late winter if located within 100 miles of the Minnesota wolf population, or having at least 200 wolves if located beyond that distance.”

Wolves in Wisconsin and Michigan would be downlisted if the population within each state remained above eighty wolves for three consecutive years. When the Final Rule was published in April 2003, the eastern gray wolf population exceeded the numerical criteria for downlisting and delisting set forth in the recovery plan.

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383 Id. at 103 (quoting 16 U.S.C. § 1533(f)(1)(2000)).
385 Fund for Animals, 903 F. Supp. at 103.
386 Id.
388 Id. at 15,812.
389 Federal Defendants’ Reply, supra note 210, at 27.
391 Id. at 15,813–14. A 1997–98 survey of natural resource personnel found approximately 2445 wolves in 385 packs in Minnesota during the winter of that period. Id. at 15,813. The survey indicated the Minnesota population was growing at an annual rate of 3.7%, and the wolf range had expanded to forty percent of the state. Id. In late winter 1996–97 the wolf populations in Wisconsin and Michigan exceeded their reclassification criteria. Id. at 15,813–14. Since then, their numbers have continued to climb. Id. The Wis-
The Northern Rocky Mountain Recovery Plan focused on Montana, Idaho, and Wyoming. The plan established a recovery criterion of at least ten breeding pairs of wolves for three successive years in each of the three recovery areas, with a population of 300 adult wolves prior to delisting. If one recovery area maintained ten breeding pairs for three consecutive years, that area could be downlisted to threatened status. However, if two recovery areas maintained ten breeding pairs, or approximately 200 adult wolves, for three consecutive years, gray wolves throughout the entire northern Rocky Mountain area could be reclassified from endangered to threatened. In 1995, gray wolves captured in Canada were reintroduced into central Idaho and the Yellowstone area. In 2000, the FWS proposed changing the downlisting and delisting goals. When the Final Rule was published in 2003, the northern Rocky Mountain gray wolf population exceeded both the original and revised downlisting criteria.

The Southwest Recovery Plan included portions of Arizona, New Mexico, Texas, and Mexico. The preliminary goals of the plan were

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393 Id. at 15,815.
394 Id.
395 Id.
396 Fitzgerald, supra note 4, at 85–92.
to reestablish a population of 100 Mexican wolves within the wolf’s historic range.\(^{400}\) In January 1998, the FWS reintroduced Mexican wolves into the Blue Range Wolf Recovery Area as a nonessential experimental population.\(^{401}\) By 2003, there were at least twenty-four Mexican wolves in eight packs in the recovery area.\(^{402}\) Since the program was in its infancy, the Mexican wolf retained endangered species status, except in the nonessential experimental population area.\(^{403}\)

DOI alleged that the decision to downlist the Eastern and Western DPSs from endangered to threatened species status was based on the gray wolf’s recovery progress under the plans and the FWS evaluation of the five-factor threat analysis.\(^{404}\) In *Defenders of Wildlife*, the court did not specifically address the significance of meeting recovery plan goals, but its decision indicates that it did not concur with DOI.\(^{405}\) The text and legislative history of the ESA demonstrate that meeting recovery plan goals is only a preliminary step in the downlisting process, which must be based on the five factors set forth in section 4(a) of the ESA.\(^{406}\) The courts do not treat the recovery plan as a legally enforceable document.\(^{407}\) Meeting recovery plan goals in the Eastern and Western DPSs did not constitute a sufficient basis to downlist the gray wolf across this portion of its historic range.\(^{408}\)

1. Legislative and Executive Action

The text of the ESA demonstrates that listing, downlisting, and delisting decisions must be done according to the five-factors set out in section 4(a).\(^{409}\) The SOI is required to “develop and implement plans . . . for the conservation and survival of endangered species and threatened species . . . unless he finds that such a plan will not promote the conservation of the species.”\(^{410}\) The plans must include “objective, measurable criteria which, when met, would result in a deter-

\(^{400}\) Id. at 15,818.
\(^{401}\) Id. at 30–36.
\(^{403}\) Id.
\(^{404}\) Id. at 15,810–11, 15,824; Federal Defendants’ Reply, *supra* note 210, at 18.
\(^{406}\) Id. at 1166, 1172.
\(^{407}\) Id. at 1172.
\(^{408}\) Id.
mination, *in accordance with the provisions of this section*, that the species be removed from the list.”\textsuperscript{411} The satisfaction of the recovery goals alone are not the basis for downlisting or delisting decisions.\textsuperscript{412}

The legislative history of the ESA reinforces this point.\textsuperscript{413} Precursors of the ESA did not focus on species recovery, but on species extinction.\textsuperscript{414} The Endangered Species Preservation Act of 1966 established “a program for the conservation, protection, restoration, and propagation” of domestic endangered species.\textsuperscript{415} The SOI was required to develop a list of endangered species and encourage other federal agencies to use their authority to protect endangered species.\textsuperscript{416} No attention was paid to the removal of species from the list.\textsuperscript{417}

Delisting was addressed in the Endangered Species Conservation Act of 1969.\textsuperscript{418} The SOI was required to review the endangered species list every five years to determine whether the species “continued to be threatened with worldwide extinction.”\textsuperscript{419} Species that were no longer endangered would be removed from the list.\textsuperscript{420} The Endangered Species Act of 1973 focused on extinction, but was also concerned with delisting.\textsuperscript{421} The ESA was designed to conserve endangered and threatened species.\textsuperscript{422} Conservation is defined as “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.”\textsuperscript{423}

Given the problems posed by listings, designations, and consultations,

\textsuperscript{411} Id. § 1533(f)(1)(B)(ii) (emphasis added).
\textsuperscript{412} See id. § 1533(a), (f).
\textsuperscript{416} Id.
\textsuperscript{417} Doremus, *supra* note 414, at 10,440–41; Patlis, *supra* note 414, at 69–70.
\textsuperscript{419} Id.
\textsuperscript{420} Doremus, *supra* note 414, at 10,440–41.
\textsuperscript{422} See id. § 2(b).
\textsuperscript{423} Id. § 3(2); Doremus, *supra* note 414, at 10,441.
little attention was directed at recovery, which remained an aspirational goal.\textsuperscript{424}

The Endangered Species Act Amendments of 1978 focused on the process for delisting species.\textsuperscript{425} Section 4(f) of the ESA required the SOI to develop recovery plans.\textsuperscript{426} The House Merchant Marine and Fisheries Committee declared, “The ultimate goal of the Endangered Species Act is to focus sufficient attention on listed species so that, in time, they can be returned to a healthy state and removed from the list.”\textsuperscript{427} Building on agency practice,\textsuperscript{428} the SOI was required to develop recovery plans that would provide “a framework for actions directed at conserving or, at least insuring the survival” of listed species.\textsuperscript{429} The committee language was changed in the conference committee, which explained that recovery plans were designed “to ensure the conservation or survival of each listed species.”\textsuperscript{430}

The Reagan Administration shifted the emphasis on recovery from an aspirational goal to the delisting of species.\textsuperscript{431} Congress began to discuss recovery in terms of returning species to healthy levels.\textsuperscript{432} The Endangered Species Act Amendments of 1982 instructed the SOI to “give priority in preparation of recovery plans to those species that are, or may be, in conflict with construction or other development projects.”\textsuperscript{433} Congress also mandated that the same process and criteria employed for listing a species be used to delist a species.\textsuperscript{434} The recovery process was not fully implemented.\textsuperscript{435} The 1986

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{424} Oliver A. Houck, \textit{The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce}, 64 U. COLO. L. REV. 277, 345 (1993).
\item\textsuperscript{426} Federico Cheever, \textit{The Road to Recovery: A New Way of Thinking About the Endangered Species Act}, 23 ECOLOGY L.Q. 1, 34–35 (1996).
\item\textsuperscript{427} H.R. Rep. No. 95-1625, \textit{reprinted in Legislative History, supra note 143}, at 730.
\item\textsuperscript{428} At the time there were fifty-nine recovery teams developing recovery plans for seventy-three priority species. Cheever, \textit{supra} note 426, at 35; Doremus, \textit{supra} note 414, at 10,444 n.141.
\item\textsuperscript{430} H.R. Rep. No. 95-1804, \textit{reprinted in Legislative History, supra note 143}, at 1219; See Patlis, \textit{supra} note 414, at 71 n.70 (describing the complete series of changes).
\item\textsuperscript{431} Federico Cheever, \textit{The Rhetoric of Delisting Species Under the Endangered Species Act: How to Declare Victory Without Winning the War}, 31 ENVTL. L. REP. 11,302, 11,305 (2001).
\item\textsuperscript{432} Id. By 1982, “approximately 160 recovery plans had been proposed and seventy-five approved for implementation.” Houck, \textit{supra} note 424, at 345.
\item\textsuperscript{434} Id. at 12, \textit{as reprinted in} 1982 U.S.C.C.A.N. 2812.
\item\textsuperscript{435} Houck, \textit{supra} note 424, at 345. By 1986, only four of the 425 domestic species listed were recovered; another sixteen were improving; sixteen others were either extinct or
\end{enumerate}
\end{footnotesize}
FWS regulations declared that “recovery is not attained until the threats to the species as analyzed under section 4(a)(1) of the Act have been removed” and the “protective measures provided for listed species under the Act are no longer needed . . . .”

The Endangered Species Act Amendments of 1988 focused on recovery planning. The GAO was very critical of the recovery process. Congress attempted to improve the implementation of recovery plans and link the attainment of recovery goals to delisting by enacting several changes. First, the SOI was required to compose recovery plans without regard to a species’ taxonomic classification. No more preference would be given for species of higher taxonomic orders. Second, resources would be allocated more evenly among species on the basis of biological information, with priority given to species that were most likely to benefit, as well as those posing the greatest obstacles to development activities. Third, section 4(f) was amended to require that each recovery plan have site specific management activities, objective criteria by which to judge success of the plan, and time frames and estimates of costs to carry out the planned recovery. The SOI was required to report to Congress on the status of recovery annually. Fourth, recovered species would be moni-

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438 U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-89-5, ENDANGERED SPECIES: MANAGEMENT IMPROVEMENTS COULD ENHANCE RECOVERY PROGRAM 23 (Dec. 1988), available at http://archive.gao.gov/d17t6/137715.pdf [hereinafter GAO REPORT]. The GAO found that in the ten years since the 1978 Amendments, only fifty-six percent of the listed species had approved plans. Id. Plans for another eighteen percent of the listed species were in preparation. Id. The planning process had not yet begun on one fourth of the listed species. Id. Species with plans had been listed for an average of six and a half years before recovery plans were completed. Id. at 24. Only half of the tasks in sixteen plans chosen for examination had been initiated, although the plans reviewed had been approved for an average of four years. Id.; Cheever, supra note 426, at 40.
440 Id. at 9, as reprinted in 1988 U.S.C.C.A.N. 2708.
441 Id. From fiscal year 1982 to fiscal year 1986, only five percent of listed species had received about forty-five percent of funding for recovery planning. Id.
442 Id.
443 Id.
tored for five years after delisting. Emergency listing authority was provided to prevent any significant risks to the species. Nevertheless, Congress recognized that the recovery of endangered and threatened species would be a very long process. Such efforts had been underway for a decade or longer for many species, yet recovery still was not in sight.

The new guidelines instituted after the 1988 Amendments in response to the GAO criticism pointed out that objective measurable criteria were essential for recovery planning. Long-term survival and delisting were not required objectives of recovery planning. Drafters of recovery plans were instructed to “[c]hoose among delisting, downlisting, or protection of existing populations. Be ambitious, but do not set an unobtainable objective.” A minimal viable population “may prove useful” in developing recovery plan objectives, but was not mandatory. The implementation of recovery planning was crucially important.

The Clinton Administration, which attempted to prove that the ESA was compatible with economic development, stressed that delisting would be the measure of success for species conservation. The FWS and the NMFS published a joint policy regarding ESA implementation in 1994, which affected recovery planning. In 1996, the FWS emphasized the importance of the link between the recovery plan and delisting.

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446 Id.
447 Id.
448 Id.
449 Cheever, supra note 426, at 41; see U.S. Fish & Wildlife Serv., Policy and Guidelines for Planning and Coordinating Recovery of Endangered and Threatened Species 4 (May 25, 1990) [hereinafter FWS Guidelines]; GAO Report, supra note 438, at 5. Recovery is defined in guidance documents as the “process by which the decline of an endangered or threatened species is arrested or reversed, and threats to its survival are neutralized, so that its long-term survival in nature can be ensured.” FWS Guidelines, supra, at 1.
450 FWS Guidelines, supra note 449, at I-5.
451 Id.
452 Id. at I-12.
453 See Cheever, supra note 426, at 41.
454 Cheever, supra note 431, at 11,306.
In 2002, the FWS, acknowledging the status of recovery plans, declared, “‘Recovery plans’ are central to the recovery of listed species, but are not regulatory documents. Recovery plans . . . serve as the road map for the species’ recovery, laying out where we need to go, how best to get there, and how long we think it will take.” According to the FWS, “[w]e know when a species may be ready for downlisting or delisting by measuring their status against the tangible objectives and criteria developed in its recovery plan.” Nevertheless, the current FWS regulation continues to stress that recovery constitutes “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.”

2. Case Law

The courts have not found the provisions in recovery plans to be legally enforceable. Environmental groups have experienced no success at enforcing provisions of recovery plans. The National Wildlife Federation (NWF) and Wyoming Wildlife Federation (WWF) challenged the National Park Service (NPS) decision to keep Fishing Bridge Campground in Yellowstone National Park open. The NWF and WWF wanted the campground closed in order to avoid human

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457 Id. at 2.
458 Id. at 13.
459 50 C.F.R. § 402.02 (2005).
461 Id.
462 Id.
contact with grizzly bears, the primary cause of grizzly bear death. The federal district court in *National Wildlife Federation v. National Park Service* rejected the NWF and WWF assertions that the campground had to be closed under the terms of the Grizzly Bear Recovery Plan. The court, recognizing the SOI’s great discretion regarding recovery plans, refused to “second guess the SOI’s motives for not following the recovery plan.”

The National Audubon Society (NAS) also brought suit to halt the FWS capture of wild condors. The federal district court halted the program because the FWS failed to justify its departure from former policy, including the Condor Recovery Plan. However, in *National Audubon Society v. Hester*, the U.S. Court of Appeals for the District of Columbia reversed the district court’s ruling, and refused to force the FWS to comply with the Condor Recovery Plan.

In a similar suit, Defenders of Wildlife (DOW) brought suit to enforce specific provisions of the 1987 Northern Rocky Mountain Wolf Recovery Plan, which mandated the reintroduction of the gray wolf into Yellowstone National Park. The federal district court in *Defenders Of Wildlife v. Lujan* rejected the assertion, stating that “[t]he Recovery Plan itself has never been an action document.” Even the FWS recognized that “only when an actual action plan was in hand could the environmental impact of the recovery effort in Yellowstone be determined.”

Lastly, the Fund for Animals brought suit to stop the filling of wetlands within the habitat of the endangered Florida panther in violation of the Florida Panther Recovery Plan. The U.S. Court of Appeals for the Eleventh Circuit in *Fund for Animals, Inc. v. Rice* similarly rejected their argument stating, “Section 1533(f) makes it plain that recovery plans are for guidance purposes only. By providing general

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464 Id.
465 Id. at 388–89.
466 Id. at 389.
468 Id. at 406–07.
469 Id.; Cheever, supra note 461, at 408–09.
471 Id.
472 Id.
473 Fund for Animals, Inc. v. Rice, 85 F.3d 535, 539, 547 (11th Cir. 1996).
guidance as to what is required in a recovery plan, the ESA ‘breathes discretion at every pore.’”

3. FWS Expert Opinion

The decision to downlist the gray wolf across the entire Eastern and Western DPSs was contrary to the FWS’s own expert advice. The Eastern Wolf Recovery Team did not conclude that satisfaction of the recovery goals justified the downlisting of the gray wolf across the entire Eastern DPS. In June 1997, the FWS sought feedback from the Eastern Wolf Recovery Team regarding the goals of the plan, the present status of the taxon, and the 1996 DPS policy. The team recommended the downlisting of the gray wolf to a threatened species in the western Great Lakes, but opposed downlisting in the Northeast to preserve future options in the region. In January 1998, the recovery team was asked to consider the reoccurrence of areas not addressed in the 1992 recovery plan and to provide recommendations on whether to proceed in those areas. The recovery team reiterated its support for the creation of a separate Western Great Lakes DPS and the continued protection of the gray wolf in the Northeast as an endangered species. The team felt that success in the western Great Lakes did not support the downlisting of the gray wolf throughout its entire historic range.

The FWS also ignored its own experts regarding the downlisting of the entire Western DPS. The FWS changed the recovery criteria

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474 Id. (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975) (internal citations omitted)).
476 Plaintiffs’ Response Memorandum, supra note 208, at 35.
477 Id.
478 Id.
479 Id. at 35–36.
480 Id. at 36; see Plaintiffs’ Reply Memorandum, supra note 269, at 29–30.
481 Plaintiffs’ Response Memorandum, supra note 208, at 36. Rolf Peterson, Eastern Recovery Team leader, stated that the team “stand[s] ready to make necessary changes to the Recovery Plan itself should the DPS designation [Western Great Lakes] be selected by the Service as the appropriate tool to further the wolf delisting process.” Id. Building on the recommendation, the FWS “Work Wolf Plan” called for the recovery team to “undertake a revision of the Eastern Recovery Plan to include criteria for the Northeastern DPS.”
482 Plaintiffs’ Reply Memorandum, supra note 269, at 28–30.

for the Northern Rocky Mountains Recovery Plan in 2002. Ed Bangs, the FWS Wolf Recovery Coordinator, testified in support of the revision, but did not recommend increasing the geographic size of the area. Instead, he limited his conclusion to the gray wolf population in the three states, and expressed no opinion regarding any expansion of the recovery area. The FWS inappropriately used recovery criteria for the northern Rocky Mountains as the standard for downlisting the entire Western DPS. Three of the peer reviewers and one FWS biologist also disagreed with the use of the Northern Rocky Mountain Recovery criteria to downlist the entire Western DPS.

D. Section 4(a): A Five Factor Analysis

Section 4(a) of the ESA provides for the listing of endangered and threatened species based on five factors: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” The same factors are utilized for downlisting and delisting species. DOI asserted that the reclassification of the gray wolf in the Eastern and Western DPSs from endangered to threatened species status was based on the gray wolf’s progress under its recovery plans, as well as the FWS evaluation of the five factor threat analysis.

The federal district court in Defenders of Wildlife v. Secretary, U.S. Department of the Interior rejected DOI’s contention and found that the downlisting of the gray wolf in the Eastern and Western DPSs was

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484 Plaintiffs’ Response Memorandum, supra note 208, at 38.
485 Id.
486 Id.
487 Id. at 39.
489 Id. § 1533(c); see also Fund for Animals v. Babbitt, 903 F. Supp. 96, 104–05 (D.D.C. 1995).
based solely on success in the two core regions. The FWS limited its analysis to the gray wolf’s current range and failed to conduct the five-factor analysis over much of the gray wolf’s historic range. Therefore, the FWS action violated the ESA. The FWS only analyzed the five factors with respect to core populations that were present in six states: Minnesota, Wisconsin, Michigan, Montana, Idaho, and Wyoming. There are thirty states in the Eastern and Western DPSs that do not have viable wolf populations. The FWS should have analyzed the five factors across a significant portion of the gray wolf’s historic range, rather than its current range. There is much habitat suitable for viable wolf populations outside of the core six states. The gray wolf still faces danger outside the core areas. The change in status from endangered to threatened decreased the protection afforded to the gray wolf.

The Final Rule retained the wolf’s threatened species status in Minnesota and downlisted the gray wolf in Michigan and Wisconsin to a threatened species. Gray wolves in Montana were downlisted to a threatened species, while the gray wolves in the experimental population regions in Wyoming and Idaho retained their threatened species status. The major problem posed by the Final Rule was the downlisting of the gray wolf beyond the two core areas of recovery. The FWS should have established two smaller DPSs encompassing the western Great Lakes and northern Rockies, then downlisted the gray wolf to a threatened species in the two smaller DPSs. The FWS analysis, which was based exclusively on the western Great Lakes and northern Rockies wolf populations, demonstrated that the gray wolves could be downlisted to a threatened species pursuant to section 4(a)

492 Id. at 1172–73.
493 Id. at 1173, 1174.
494 Id. at 1164.
495 Id. at 1162 (listing the states where DOW challenged the downlisting of the gray wolf).
496 See id. at 1165.
497 Defenders of Wildlife, 354 F. Supp. 2d at 1161, 1166.
498 Id. at 1164–65.
499 Id. at 1158.
501 Id. at 15,804, 15,808.
of the ESA.\textsuperscript{503} The FWS was too aggressive in downlisting the gray wolf across a significant portion of its historic range.\textsuperscript{504}

The FWS compliance with section 4(a) is primarily a fact question.\textsuperscript{505} The court must set aside an FWS action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{506} The court analyzes whether the FWS “considered the relevant factors and articulated a rational connection between the facts found and the choice made.”\textsuperscript{507} The FWS decision will be reversed if 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.”\textsuperscript{508} When reviewing the FWS decision, the court “sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the Secretary’s study was factually flawed.”\textsuperscript{509} Judicial review under the arbitrary and capricious standard is “searching and careful,” but “narrow.”\textsuperscript{510} The court “is not empowered to substitute its judgment for that of the agency.”\textsuperscript{511}

1. Destruction of Habitat

The FWS determined that the loss or fragmentation of habitat or a decline in the prey will not affect wolf recovery in the western Great Lakes and northern Rocky Mountain regions.\textsuperscript{512} Habitat or range de-

\textsuperscript{503} Id. at 1164–65.
\textsuperscript{504} See id.
\textsuperscript{505} See id. at 1163. These decisions “are the product either of scientific or expert inquiry and judgment or of an assimilation of detailed and varied evidence or experience, for which the agency is particularly well qualified by virtue of its bureaucratic organization of resources.” Edley, supra note 296, at 31–32.
\textsuperscript{508} Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43; see also Pyramid Lake Paiute Tribe, 898 F.3d at 1414.
\textsuperscript{509} Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1225 (D.C. Cir. 1993).
\textsuperscript{510} Citizens to Preserve Overton Park, 401 U.S. at 416.
\textsuperscript{511} Id.
\textsuperscript{512} Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15,804, 15,845 (Apr. 1, 2003). One commentator,
struction may affect the number of wolves, but will not place wolves in the two core regions in danger. The gray wolf is a habitat generalist, which means it can live in a variety of habitats where there is an adequate prey base and little human persecution. The gray wolf population in the western Great Lakes region expanded. Wolves from the densely forested northeast corner of Minnesota moved into more agricultural portions of central and northwest Minnesota, northern and central Wisconsin, and entire Upper Peninsula of Michigan. The wolf population in Minnesota grew to 2600, twice the goal of the recovery plan. The wolf population in Wisconsin increased an average of nineteen percent per year since 1985 and twenty-six percent per year since 1993, totaling 320 wolves in 2002. The wolf population in Michigan increased an average of twenty-four percent per year, consisting of at least 280 wolves in 2002. Wolves in the western Great Lakes region reside on public lands that include six national forests, four national parks, and seven national wildlife refuges, and do not face a mortal threat from habitat destruction.

Wolves were reintroduced into Yellowstone and central Idaho as a nonessential experimental population and naturally recolonized northwest Montana from Canada. The wolf population in the northern Rockies continued to expand. In 2002, there were approximately 663 wolves in forty-nine breeding pairs. All three regions in the northern Rockies, including Canada, are interconnected

who was critical of the Western DPS, recognized that there was protection of wolf habitat in the core areas of Wyoming, Idaho, and Montana, where there was more public land and adequate state management plans. Elizabeth A. Schulte, Note, From Downlisting to Delisting: Anticipating Legal Actions if Gray Wolves Are Delisted from the Endangered Species Act, 24 J. LAND, RESOURCES & ENVTL. L. 537, 551–52 (2004).

514 See id. at 15,822.
515 Id. at 15,812–14.
516 Id. at 15,841–42.
517 Id. at 15,842.
518 Id. at 15,804, 15,842.
520 Id. at 15,844–45; see also Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. 15,266, 15,281 (Mar. 27, 2006).
522 Id. at 15,818.
523 Memorandum in Support of Federal Defendants’ Motion to Dismiss and for Summary Judgment, supra note 490, at 19.
and possess an abundance of public lands. Therefore, the gray wolf is not endangered by habitat destruction in that region.

2. Overexploitation for Commercial, Recreational, Scientific, or Educational Purposes

The FWS determined that there may be an increase in the taking of gray wolves for commercial, recreational, scientific, or educational purposes with the downlisting to a threatened species. Nevertheless, the impact on the wolf populations in the western Great Lakes and northern Rockies will be minimal. Furthermore, the gray wolf will only be downlisted to a threatened species, so all protections will not be removed.

3. Disease or Predation

The FWS determined that disease and parasites pose a significant potential risk, but this risk will be avoided through diligent monitoring and follow-up. The canine parvovirus (CPV) appeared in Minnesota, but did not cause a population decline or significantly impede recovery. CPV might have had a negative impact on the Isle Royale wolf population, but other factors were also present. Wolves in Wisconsin and Michigan experienced problems with mange, but there was no significant impact on the populations. Gray wolves in the northern Rockies suffered from the same ailments, including expo-

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525 Id. at 15,846–47.
530 Id. at 15,846–47.
531 Id. at 15,847.
532 Id. at 15,847–48.
sure to brucellosis in the Yellowstone population. However, disease to date has not been a significant impediment to wolf recovery in the regions.

The FWS acknowledged that the wolf has no natural predators. Humans cause the majority of wolf deaths through shooting and vehicle collisions. Nevertheless, the wolf population has continually increased in the western Great Lakes and northern Rockies. Human-caused mortality is less than the rate of wolf recovery. Furthermore, there is still a major deterrent for killing a threatened species: a $25,000 fine and six months in jail. This lesser penalty will continue to deter illegal killing.

4. Inadequacy of Existing Regulatory Mechanisms

The FWS determined that depredation control in the western Great Lakes and Northern Rockies does not pose a threat to wolf recovery. From 1980 to 1984, an average of 2.2% of the Minnesota wolf population of 1350 wolves was killed annually for depredation. From 1985 to 1989, three percent of the Minnesota population of about 1600 wolves was killed annually for depredation. Since 1989, the wolf population in Minnesota grew by nearly four percent per year. The FWS estimated that two to three percent of the Wisconsin and Michigan wolf population—250 to 300 wolves—will be killed annually for depredation. With annual increases in the wolf popula-

533 Id. at 15,848.
534 Id at 15,846–49; see also Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,285. Recently, there has been an outbreak of canine parvovirus (CPV), which has had an adverse impact on the Yellowstone wolf population. Jim Robbins, Deadly Disease Is Suspected in Decline of Yellowstone Wolves, N.Y. Times (Jan. 15, 2006). NPS had decided not to inoculate wolf pups, so that they may acquire natural immunity. Id.
536 Id. at 15,849–52.
537 Id. at 15,849.
538 Id. at 15,851.
539 Id. at 15,845.
540 Federal Defendants’ Opposition, supra note 352, at 30–33.
542 Id. at 15,853.
543 Id.
544 Id. at 15,854.
545 Id.
tion of nineteen to twenty-four percent in recent years, depredation control is not expected to harm wolf recovery.\textsuperscript{546}

The FWS pointed out that downlisting the gray wolf to a threatened species in the western Great Lakes and Northern Rockies will subject the wolf to section 4(d) rules, which grant the states broader authority to take the species without a formal permit from the FWS.\textsuperscript{547} Presently wolves in Minnesota can be taken for depredation because they are classified as a threatened species.\textsuperscript{548} However, wolves in Wisconsin and Michigan can not be taken for depredation because in those states, the wolf is classified as an endangered species.\textsuperscript{549} Wisconsin and Michigan can only relocate problem wolves.\textsuperscript{550} Wisconsin and Michigan have experienced a nineteen to twenty percent growth in their wolf populations in recent years, so capturing and finding suitable habitat for wolf relocation is becoming a problem, and generating opposition to the wolf.\textsuperscript{551} Wisconsin and Michigan want to use the same controls as Minnesota for depredating wolves.\textsuperscript{552} The FWS concluded that these controls will help to generate greater public acceptance for wolf preservation.\textsuperscript{553}

The same is true in the northern Rockies.\textsuperscript{554} Most of the wolves on public lands in the region are a threatened species pursuant to section 10(j) of the ESA.\textsuperscript{555} The remaining wolves in northwest Montana are an endangered species.\textsuperscript{556} From 1987 to 2002, the U.S. Department of Agriculture removed an average of fifty-three wolves annually, or six percent, of the northwest Montana population.\textsuperscript{557} This was higher than in other regions because the area lacks millions of

\textsuperscript{546} Id.
\textsuperscript{547} See Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,860; see also supra note 87 and accompanying text.
\textsuperscript{548} Id. at 15,854. Minnesota is subject to a special section 4(d) rule. Id.
\textsuperscript{549} Id. at 15,852 (attempting to delist the gray wolf in Wisconsin and Michigan from endangered to threatened).
\textsuperscript{550} See id.
\textsuperscript{551} Id. at 15,852–53.
\textsuperscript{552} Id. at 15,853.
\textsuperscript{554} Id. at 15,855, 15,857.
\textsuperscript{556} Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,855.
\textsuperscript{557} Id. at 15,856.
acres of contiguous public lands and an adequate prey base.\textsuperscript{558} Much of the suitable habitat in the northern Rockies is already occupied.\textsuperscript{559} The movement of wolves into livestock areas will generate more conflict and result in greater wolf killings.\textsuperscript{560} The section 4(d) regulations in the nonessential experimental population areas in the northern Rockies, which have been in place since 1995, have not jeopardized the gray wolf population.\textsuperscript{561} The proposed section 4(d) regulations are similar to the nonessential experimental population regulations.\textsuperscript{562} The FWS concluded that the downlisting of the wolf in the northern Rockies and application of the section 4(d) rules will increase management flexibility and create greater toleration for the wolf.\textsuperscript{563}

5. Other Natural or Manmade Factors Affecting Existence

The FWS determined that the long-term survival of the gray wolf is dependent on public attitudes.\textsuperscript{564} At the hearings on state wolf management plans in the states of Minnesota,\textsuperscript{565} Wisconsin,\textsuperscript{566} and

\begin{itemize}
\item \textsuperscript{558} See id.
\item \textsuperscript{559} Id.
\item \textsuperscript{560} Id.
\item \textsuperscript{561} Id. at 15,808, 15,856.
\item \textsuperscript{562} See Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,856.
\item \textsuperscript{563} Id. at 15,857–58.
\item \textsuperscript{564} Id. at 15,849.
\item \textsuperscript{565} Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. 15,266, 15,287 (Mar. 27, 2006) (to be codified at 17 C.F.R. pt. 50). In 2001, Minnesota Department of Natural Resources completed its comprehensive wolf management plan, which is based on the recommendations of the wolf management roundtable and on the State wolf management law passed in 2000. Id. The plan includes provisions for population monitoring, the management of problem wolves, wolf habitat and prey, the enforcement of laws prohibiting the taking of wolves, public education, and increased staffing for wolf management and research. Id. at 15,289–90. The plan divides the state into wolf management Zones A and B, which correspond to Zones 1–4 and 5, respectively, in the Federal Wolf Recovery Plan. See id. at 15,289–90. In Zone A, where over eighty percent of the state’s wolves reside, state protections would be nearly as strict as current protections under the ESA, resulting in little or no post-delisting population decline. Id. at 15,289. The protection provided by the plan to the Zone A wolves will ensure a state wolf population well above 1600 in that zone. Id. at 15,290. In Zone B, wolves could be killed to protect domestic animals, even if attacks or threatening behavior have not occurred. Id. While a significant decrease in the Zone B wolf population may result, such a result would be consistent with the Federal Recovery Plan, which discourages the establishment of a wolf population in that portion of the state. Id. However, the Minnesota legislature has not yet enacted the plan into law. See id. at 15,287.
\item \textsuperscript{566} Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,290. The Wisconsin wolf management plan has a goal of
Michigan,\textsuperscript{567} there was much public support for wolf recovery.\textsuperscript{568} Nevertheless, the public was only agreeable if there would be minimal adverse impacts on recreational activities and livestock production.\textsuperscript{569} The same was true in the northern Rocky Mountain states. The FWS concluded that the new section 4(d) rules regarding the taking of wolves will enhance public support for wolf recovery.\textsuperscript{570}

IV. POST-LITIGATION DEVELOPMENTS

There were several major developments regarding gray wolf recovery following \textit{Defenders of Wildlife v. Secretary, U.S. Department of the Interior}.\textsuperscript{571} The U.S. District Court for the District of Vermont, employing similar reasoning as the district court in \textit{Defenders of Wildlife}, invalidated the FWS’s cessation of wolf recovery efforts in the Northeast.\textsuperscript{572} DOI instituted several regulatory changes, which granted Montana, Idaho, Michigan, and Wisconsin greater authority to take

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\item 350 wolves outside Native American reservations. It allows for different levels of management within four separate zones. \textit{Id.} at 15,293. The two zones that now contain most of the state’s wolves would be managed to allow limited lethal control of problem wolves—when the population exceeds 250, but in general, lethal control would not be practiced on large blocks of public land. \textit{Id.} at 15,294. In the other two zones, which have limited habitat, control would be less restricted for problem wolves. \textit{Id.} The Wisconsin plan also calls for monitoring, education, reimbursement for depredation losses, habitat management, cooperation with tribes, and development of new legal protections. \textit{Id.} at 15,292. If the population exceeds 350, a proactive depredation control program would be allowed in all four zones and public harvest would be considered. \textit{Id.} at 15,294. Because the wolf population now exceeds this level, the State has taken initial steps to delist the wolf and classify it as a protected wild animal. Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,290–92. If the numbers decline and stay below 250 for three years, the State will relist the wolf as threatened. \textit{Id.} If they decline to less than eighty for one year, the State will relist or reclassify the wolf as an endangered species. \textit{Id.} The Wisconsin Natural Resource Board approved the plan in 1999. \textit{See id.}
\end{itemize}

\textsuperscript{567} Under Michigan’s wolf management plan, wolves would be considered recovered in Michigan when a minimum sustainable population of 200 wolves is maintained for five consecutive years. Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,295. The Upper Peninsula has had more than 200 wolves since 2000. \textit{Id.} Once the gray wolf is federally delisted, it will be eligible for state delisting. \textit{Id.} Following federal delisting, the State intends to reclassify Michigan wolves to protected animal status. \textit{Id.} Such status prohibits taking and details the conditions in which lethal depredation control can be carried out by the Michigan Department of Natural Resources. \textit{Id.}

\textsuperscript{568} Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,857.

\textsuperscript{569} \textit{Id.}

\textsuperscript{570} \textit{See id.}


\textsuperscript{572} \textit{Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 557, 560–68.}
Depredating wolves. DOI also proposed the establishment of two separate DPSs in the northern Rocky Mountains and western Great Lakes and the delisting of those gray wolf populations.

A. A Court Challenge to the FWS Creation of the Eastern DPS

The National Wildlife Federation (NWF) and four other plaintiffs filed suit in the U.S. District Court for the District of Vermont, challenging the FWS abandonment of wolf recovery efforts in the Northeast. The FWS initially proposed the establishment of the Northeast DPS, which would contribute to the restoration of the species. FWS experts and scientific reviewers supported the proposal. However, the proposal was abandoned because the existence

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573 See id. at 559.
574 See id. at 562–64.
575 Eric Palola, Director of the National Wildlife Federation’s Northeast Natural Resource Center, stated that “[a]lthough the thriving wolf populations in the Great Lakes and Northern Rockies are indeed wildlife success stories, they cannot be used as an excuse for abandoning the goal of wolf recovery in the Northeast.” Press Release, Nat’l Wildlife Fed’n, NWF Pursues Legal Action to Ensure Wolf Recovery in the Northeast (Sept. 25, 2003), available at http://www.timberwolfinformation.org/info/archieve/news papers/viewnews.cfm?ID=985. Palola declared, “[r]ather than walk away from pursuing wolf recovery in the Northeast, the U.S. Fish and Wildlife Service should be educating people about how wolves contribute to a healthy environment for the Northern forests and working to establish agreements with Canada and among the states where habitat exists.” Id.
576 The other plaintiffs were the Maine Wolf Coalition, Maine Audubon Society, Vermont Natural Resources Council, and Environmental Advocates of New York. Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 553.
577 Id.
579 Id. John Kostyack, NWF Senior Counsel for Wildlife Conservation, stated that “[t]he administration’s plan is illegal and contrary to what all the scientific experts recommend for wolf recovery.” Press Release, Nat’l Wildlife Fed’n, New FWS Wolf Proposal Shortsighted (July 16, 2004), available at http://huntingandfishingjournal.org/archives/issues/wolfNWF-WolfDelistingPressRelease-07-04.pdf. Peggy Struhsacker, Coordinator for NWF’s Wolf Recovery Program in Vermont, declared that “[l]umping the vacant wolf habitat in the Northeast with habitat full of wolves in the Great Lakes defies common sense.” Id. Struhsacker later stated, “wolf recovery in this region doesn’t stand a chance without a reversal of this portion of the administration’s rule. . . . The howl of the wolf has been missing too long from the Northern forests and our national wolf recovery efforts cannot be declared complete while that gap remains.” Press Release, supra note 575.
580 See Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 563. Paul Nickerson, the former chief of the endangered species division of the Northeast region of FWS, stated “[t]o leave out the whole Northeast and say they’re recovered, I think we’re kind of kidding ourselves, from a
and identity of the wolf in the Northeast was uncertain and unknown. The FWS combined the Northeast DPS with the western Great Lakes to form the Eastern DPS.

The federal district court rejected the FWS decision on several grounds. First, the court held that the Final Rule must be the “logical outgrowth” of the Proposed Rule, otherwise “affected parties will be deprived of notice and an opportunity to respond to the proposal.” The FWS abandonment of the Northeast DPS in the Final Rule deviated too much from the Proposed Rule. Even the FWS acknowledged that the Final Rule constituted a major departure. Ronald L. Refsnider, the primary author of the Final Rule, proposed publishing “a 6-month extension for the gray wolf proposal in July [2001], based upon internal FWS disagreement . . . . The extension notice would open a comment period . . . and ask for information on 8 or so issues that would help with [FWS’s] decision on the NE DPS.” Nevertheless, the FWS proceeded without additional comment.

Second, the court held that the FWS violated the DPS policy and the ESA. In the Proposed Rule, the FWS determined that the four proposed DPSs were discrete because “each [was] being repopulated by wolves of distinct morphological characteristics which may represent different gray wolf subspecies.” In the Final Rule, the FWS declared that the wolves in the Northeast could be a different subspecies from the wolves in the Midwest. Nevertheless, the FWS combined the two subspecies into a single DPS, which was based on geography.

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582 Id. at 15,818.
584 Id. (quoting Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).
585 Id. (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983)).
586 See id. at 562.
587 Id.
588 Id.
590 Id. at 563–64.
591 Id. (citing Proposal to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43,473 (July 13, 2000)).
592 Id. (citing Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15,804, 15,835–36 (Apr. 1, 2003)).
not biology.\textsuperscript{593} This geographic approach, which used “infranational boundaries as a basis for recognizing discrete entities for delisting,” had been rejected by the FWS in the 1996 DPS policy.\textsuperscript{594} Although the approach was attractive “[p]articularly when applied to the . . . reclassification of a relatively widespread species for which a recovery program is being successfully carried out in some states,” the FWS found it “inappropriate as a focus for a national program.”\textsuperscript{595}

Third, the court held the designation of the Eastern DPS violated the DPS policy and the ESA.\textsuperscript{596} The court rejected the FWS assertion that a “non-DPS remnant” could not be created outside the DPS.\textsuperscript{597} The SOI could establish a “non-DPS remnant” designation, particularly when the remnant area was already listed within the historic range of the endangered species.\textsuperscript{598} The SOI could maintain a national listing and establish a DPS where necessary for management flexibility to protect the species and its habitat from extinction.\textsuperscript{599} The FWS could not simply “lump[] together” the core population with a low to non-existent population outside the core area and downlist or delist the entire area.\textsuperscript{600} The FWS application of the DPS policy was “inconsistent with the statute under which the regulations were promulgated.”\textsuperscript{601}

Finally, the court held that the SOI did not analyze the five factors for downlisting across a significant portion of the gray wolf’s range.\textsuperscript{602} The FWS employed a definition of “significant portion of its range” developed while meeting at Marymount University during the comment period of the Proposed Rule, and subsequently determined that the existence of the western Great Lakes wolf population rendered the remainder of the Eastern DPS insignificant, even though “extensive and significant gaps” in range would be created without the

\textsuperscript{593} Id.
\textsuperscript{596} Id. at 564–65.
\textsuperscript{597} Id. at 564.
\textsuperscript{598} Id. at 565.
\textsuperscript{599} See id. at 564.
\textsuperscript{600} Id. at 565.
\textsuperscript{601} Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 565 (quoting Mines v. Sullivan, 981 F.2d 1068, 1070 (9th Cir. 1992)).
\textsuperscript{602} Id. at 565–66.
Northeast DPS. The Final Rule rendered all areas outside the core area insignificant. This contradicted the meaning of “significant portion of its range” set forth by the U.S. Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. Norton (Norton-Lizard)*, dealing with the flat-tailed horned lizard, and the U.S. District Court of the District of Columbia in *Defenders of Wildlife v. Norton (Norton-Lynx)*, dealing with the lynx. John Kostyack, the National Wildlife Federation attorney, declared the ruling a “major victory for wolves and for all the people who care so much about preserving America’s natural heritage.”

### B. Regulatory Action

On January 6, 2005, the FWS promulgated rule 10(j), which granted western states and Native American tribes with approved wolf management plans (specifically, Montana and Idaho) expanded authority over the nonessential experimental population of wolves within their boundaries. The new rule permits the following: the taking of wolves attacking livestock, guardian animals, and dogs on private land without authorization; the taking of wolves attacking the aforementioned by permittees on public land grazing allotments without prior authorization; and the taking of wolves determined to have an adverse impact on wildlife by state and tribal officials after public and scientific review. The new rule also allows states and tribes with wolf management plans to enter into cooperative agreements for the management of experimental populations on public

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603 *Id.* The FWS defined “significant portion of its range” as “that area that is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the taxon to persist into the foreseeable future.” *Id.* at 565.

604 *Id.* at 566.

605 258 F.3d 1136, 1144–45 (9th Cir. 2001).


land.\textsuperscript{611} This is a valuable experiment that will further the goals of cooperative federalism manifested in the ESA. Both Montana and Idaho have approved wolf management programs.\textsuperscript{612} The implementation of the regulation will demonstrate whether the states can adequately manage their gray wolf populations and whether public attitudes are changed by greater state control.\textsuperscript{613}

Wyoming was not granted expanded authority because Wyoming’s management plan had not been approved.\textsuperscript{614} The FWS instructed Wyoming to change the wolf’s status as a predator throughout most of the state.\textsuperscript{615} Designating wolves as “trophy game” statewide would permit Wyoming to implement a management scheme that provides for a self-sustaining population above the recovery goals, and regulates the taking of wolves.\textsuperscript{616} Wyoming also had to commit by law to manage at least fifteen wolf packs in the state.\textsuperscript{617} Finally, Wyoming’s definition of pack had to be biologically based and consistent with the Montana and Idaho definition.\textsuperscript{618} Wyoming brought suit, alleging that its program was rejected because of politics, not science.\textsuperscript{619} Wyoming expanded the basis of the suit, alleging that DOI had not adequately monitored wolves and failed to comply with the National Environmental Policy Act (NEPA).\textsuperscript{620} The case was heard and dismissed by the U.S. District Court for the District of Wyoming in March 2005.\textsuperscript{621} DOI then announced that it was ready to delist the wolves in the northern Rockies once Wyoming’s manage-

\textsuperscript{611} Id. at 1298–99.
\textsuperscript{612} U.S. Fish & Wildlife Serv., supra note 609, at 38–40.
\textsuperscript{613} In April 2006, the Idaho Fish and Game Department requested permission from the FWS to reduce the wolf population in the Lolo elk management zone of the Clearwater region by as many as forty-three wolves, alleging excess wolf predation of elk. \textsc{Idaho Dep’t of Fish & Game, Effects of Wolf Population on North Central Idaho Elk Populations} 7 (Apr. 4, 2006), \textit{available at} http://fishandgame.idaho.gov/cms/wildlife/wolves/proposal.pdf.
\textsuperscript{614} Id.; see also U.S. Fish & Wildlife Serv., supra note 609, at 37–40.
\textsuperscript{616} Id.
\textsuperscript{617} Id.
\textsuperscript{618} Id.; see also 90-Day Finding on Petitions to Establish the Northern Rocky Mountain Distinct Population Segment of Gray Wolf, 70 Fed. Reg. 61,770, 61,774 (Oct. 26, 2005) (to be codified at 50 C.F.R. pt. 17).
\textsuperscript{620} Id. at 1224–25.
\textsuperscript{621} Id. at 1244–45.
ment plan was completed. Wyoming Governor David Freudenthal characterized DOI’s statement as “political blackmail” that was designed to pressure Wyoming into capitulating to the federal government’s management plan, “a move he says the state doesn’t intend to make.” In April 2006, the Tenth Circuit upheld the dismissal of Wyoming’s suit.

In April 2005, the FWS granted Wisconsin and Michigan permits pursuant to section 10(a)(1)(A) that allowed the lethal taking of wolves killing livestock. Section 10(a)(1)(A) authorizes the SOI to permit prescribed actions “for scientific purposes or to enhance the propagation or survival of the affected species . . . .” The U.S. District Court for the District of Columbia struck down the action because the FWS failed to provide notice and the opportunity to comment prior to issuing the permits.

On October 26, 2005, the FWS, relying on its earlier analysis, announced that it was considering establishing a Northern Rocky Mountain DPS, and delisting that wolf population. On March 27, 2006, the FWS proposed the creation of a western Great Lakes DPS and delisting of that wolf population. The creation of the two DPSs should be applauded, but delisting at this point is still dysfunctional and premature. DOI should heed the warning of Professor Holly Doremus:

Delisting is an aspirational goal, the achievement of which will require substantial regulatory and societal changes, rather than a realistic short-term expectation. The primary

623 Id.
626 16 U.S.C. § 1539(a)(1)(A)
purpose of the ESA is not delisting; rather it is the protection of species against ill-considered human activity while society works toward the kind of fundamental mechanisms of regulating economic development that might support widespread delisting. The ESA can encourage progress towards such changes, both by making society aware of the shortcomings of its current regulatory efforts and by providing an incentive for improvements in other regulation, but it serves its purpose if it simply provides a safety net against extinction until those changes arrive.\footnote{Doremus, supra note 414, at 10,435.}

\section*{C. Threatened and Endangered Species Recovery Act of 2005}

Judicial decisions are political resources that are “best viewed as the beginning of a political process.”\footnote{Stuart A. Shiengold, The Politics of Rights: Lawyers, Public Policy, and Political Change 85 (2d ed. 2004).} Congress is well aware of judicial decisions regarding statutory interpretations and their implications.\footnote{See Beth Henschen, Statutory Interpretations of the Supreme Court: Congressional Response, 11 Am. Pol. Q. 441, 445–55 (1983); see generally William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991); Beth M. Henschen & Edward I. Sidlow, The Supreme Court and the Congressional Agenda-Setting Process, 5 J.L. & Pol’y 685 (1989); Thomas R. Marshall, Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?, 42 W. Pol. Q. 493 (1989); Michael E. Solimine & James L. Walker, The Next Word: Congressional Response to Supreme Court Statutory Decisions, 65 Temp. L. Rev. 425 (1992).} The institutions of government behave as rational actors and attempt to have their policy preferences prevail.\footnote{See Daniel A. Farber & Philip P. Frickey, Foreward: Positive Political Theory in the Nineties, 80 Geo. L.J. 457, 475 (1992).} Following the litigation rejecting DOI’s downlisting of the gray wolf and abandonment of the Northeast DPS, the House of Representatives passed the Threatened and Endangered Species Recovery Act of 2005 (TESRA).\footnote{H.R. 3824, 109th Cong. (2005).} The House bill, which was strongly criticized by environmental groups,\footnote{Rodger Schlickeisen, President of DOW, stated that “[Representative] Pombo[’s] bill is the dream of every irresponsible developer out there . . . . Not only does this bill gut the Endangered Species Act, but it creates a government give away program to greedy developers and provides new loop holes to make it easier to use deadly pesticides that will impact not only wildlife but our children, by polluting our lands and waters.” Press Release, Defenders of Wildlife, House Guts Endangered Species Act (Sept. 29, 2005); see also Nancy Kubasek, Proposed Changes to Endangered Species Act in the Spotlight Again, 34 Real Est. L.J. 235, 241–43 (2005); Press Release, Defenders of Wildlife, Analysis of Representative
provisions involved in the litigation. The “significant portion of its range” language in the definition of endangered and threatened species was not altered. The SOI was instructed to utilize the DPS designation “only sparingly.” Recovery plans were not made legally enforceable. Listing, downlisting, and delisting decisions continued to be based on the five factors enumerated in section 4(a) of the ESA. The failure of the Republican-controlled House of Representatives to alter any of the relevant statutory provisions can be assumed to represent its implicit agreement with the federal district courts interpretation of the ESA in the DOW and NWF cases.

**Conclusion**

Throughout U.S. history, the wolf has been persecuted and driven from the lower forty-eight states. The Endangered Species Act of 1973 rectified this historical wrong and provided the means to protect and restore the wolf to its historic range. The gray wolf has rebounded in the western Great Lakes and northern Rocky Mountains, and is on the path to recovery in the Southwest. The restoration of the gray wolf is an ESA success story in progress.

In April 2003, DOI established three DPSs and downlisted the gray wolf to a threatened species in a significant portion of its historic range in the Eastern and Western DPSs. The gray wolf retained endangered species status in the Southwest DPS. The gray wolf, however, had only recovered in five percent of its historic range. The remaining ninety-five percent of its historic range was inhabited by phantom wolves.


636 See generally H.R. 3824.
637 See id. § 3.
638 See id. § 4(B).
639 See id. § 9.
640 See id. § 7.
641 Eskridge, supra note 156, at 71–84, 108–122. The Supreme Court has declared that congressional failure to address a controversial judicial interpretation when considering the reenactment of a statute “is itself evidence that Congress affirmatively intended to preserve [the interpretation].” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 (1982).
The court rejected DOI’s interpretation of the legal meaning of “significant portion of its range,” which was not consistent with the text, intent, and purposes of the ESA. The court did not uphold DOI’s implementation of its own DPS policy, which provides different populations of the same species different levels of protection in different portions of their range. The court implicitly rejected DOI’s contention that meeting the goals of the recovery plans justified, in part, the downlisting of the gray wolf across much of its historic range in the Eastern and Western DPSs. The court determined that DOI only assessed the five factors across the current range of the gray wolf.

DOI’s analysis did not support the downlisting of the gray wolf across a significant portion of its historic range in the Eastern and Western DPSs. DOI sought to downlist the wolf in as large an area as possible, so that it could delist the wolf as soon as possible, evidenced in the advanced notice of proposed rulemaking, which announced the future delisting of the Eastern and Western DPSs and subsequent proposal to delist the Eastern DPS. Despite DOI’s premature and dysfunctional decision, its analysis was sufficient to support the creation of two DPSs that encompass the current range of the gray wolf in the western Great Lakes and northern Rocky Mountains and the downlisting of the gray wolf in these two core areas to a threatened species.

DOI simply downlisted phantom gray wolves, when it should have been creating conditions for the return of the gray wolf to significant portions of its historic range. Gray wolves had recovered in the two core areas, but they still need the protection that DOI provided by retaining threatened species status. Gray wolves were, however, still absent from a significant portion of their historic range, creating significant gaps in the taxon that will jeopardize recovery. Gray wolves dispersing from the core areas into other sectors of their his-

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643 Id.
646 See generally Cheever, supra note 426, at 48–52.
toric range still require the full protection of the ESA. This will guarantee their recovery and their restoration as vital components of the ecosystems across their historic range. Furthermore, DOI’s ESA obligations were not complete, so its abandonment of recovery efforts was premature. As Peggy Struhsacker, the National Wildlife Federation wolf recovery program manager aptly noted, “the administration was ready to announce the marathon over when the finish line is still over the next hill.”

Edward O. Wilson, a Harvard University biologist, warned that the “loss of genetic and species diversity by the destruction of natural habitats . . . is the folly our descendants are least likely to forgive us.” The ESA is explicitly concerned with protection of species and the restoration of ecosystems on which they depend. DOI’s obligation under the ESA is to ensure that gray wolves, not their phantoms, stalk the land. The gray wolf, a summit predator, is a vital component of the ecosystem. The gray wolf helps to preserve biodiversity and maintain ecosystem balance by keeping prey in check, improving their genetic stock, stopping environmental dislocations, promoting the survival of other species, and allowing plant communities to flourish. A balanced ecosystem is characterized by genetic diversity, which provides goods and services beneficial to man. The howl of the wolf in the night signals that all is well for man.

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647 Gram, supra note 608.


649 Boyd, supra note 199, at 1291 n.12.

650 Biodiversity is defined as “the natural variety and variability among living organisms, the ecological complexes in which they naturally occur, and the ways in which they interact with each other and with the physical environment.” Robert S. Steneck, An Ecological Context for the Role of Large Carnivores in Conserving Biodiversity, in LARGE CARNIVORES AND THE CONSERVATION OF BIODIVERSITY 9, 13 (Justina C. Ray et al., eds., 2005) (quoting K.H. Redford & B.D. Richter, Conservation of Biology in a World of Use, 13 CONSERVATION BIOLOGY 1246–56 (1999)).