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Jesse H. Alderman
aldermje@bc.edu

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

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

INTRODUCTION

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


3 Id. at 6107-08.
("FWS") introduced gray wolves back into their native West, albeit in narrow pockets of isolated wilderness in Idaho, Montana, and Wyoming.4

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

5 The gray wolf is the largest member of the dog family. E.g., 2008 Rule, 73 Fed. Reg. at 10,515. Adult gray wolves range in size from 40-175 lbs. depending on sex and region, and wear a distinctive coat of fur that varies from grizzled-gray to coal black. E.g., id. The indigenous range of the gray wolf encompasses most of the coterminous United States, excluding some of the Southeast. E.g., id.
7 Id.
8 2008 Rule, 73 Fed. Reg. at 10,514; U.S. FISH & WILDLIFE SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO app. 2, at 5 (Apr. 14, 1994), available at http://www.fws.gov/mountain-prairie/species/mammals/wolf/EIS_1994.pdf [hereinafter GRAY WOLF FINAL EIS]. Alpha pairs produce litters of one to eleven pups for about eight years. E.g., 2008 Rule, 73 Fed. Reg. at 10,514. In the Northern Rockies, only four or five of these pups survive the winter. E.g., id. Although gray wolves can live up to thirteen years, the average lifespan of reintroduced wolves in the Northern Rockies is just four years. E.g., id.
10 Id.; GRAY WOLF FINAL EIS, supra note 8, app. 2, at 6; see also Wyo. Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1233-34 (10th Cir. 2000) (noting that wolves are known to disperse and interbreed).
12 GRAY WOLF FINAL EIS, supra note 8, app. 9, at 42 (summarizing a survey of wildlife biologists who determined a viable population of wolves in the Northern Rockies would need to disperse over a wide geography to defeat stagnate genetic exchange and inbreeding).
Wolves lived in this social structure for centuries, but as the population of the West grew, the more human sustenance and commercial profit relied on animal husbandry.\textsuperscript{13} Agricultural operations plowed the wolves’ native wild lands and invited conflict.\textsuperscript{14} Faced with periodic losses of expensive agricultural property like cattle, sheep and horses by displaced wolves, ranchers and shepherds came to revile the predator.\textsuperscript{15} In the twentieth century, Congress waged a campaign of eradication against the wolf and other animals injurious to agriculture in the West.\textsuperscript{16} The government program endorsed draconian practices that endure today, including poison baiting, trapping, and land and aerial sharp shooting.\textsuperscript{17} The government in concert with Western settlers extirpated the wolf across nearly all of its historic range.\textsuperscript{18} In fact, in 1973, the year President Nixon signed the ESA, the animal was only found in Minnesota and Michigan.\textsuperscript{19}

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

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

\textsuperscript{13} Schulte, supra note 1, at 545 (stating that newly arriving cattlemen and stockowners initiated the effort to eradicate wolves from the West).
\textsuperscript{14} \textit{Id.}; see also \textit{GRAY WOLF FINAL EIS, supra note 8, app. 13, at 57. In North America, there have been essentially no verified accounts of wolves attacking a human. \textit{Id.} app. 15, at 61.}
\textsuperscript{15} Schulte, supra note 1, at 545.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} 2008 Rule, 73 Fed. Reg. 10,514, 10,531 (Feb. 27, 2008) ("State authorized wolf control may include, just as the federally authorized control program currently does, gunning from the air and ground, trapping, and in a few cases, removing pups from dens.").
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 10,515; Schulte, supra note 1, at 558.
\textsuperscript{20} 2008 Rule, 73 Fed. Reg. at 10,515; Schulte, supra note 1, at 537.
\textsuperscript{22} \textit{Id.} at 10,517-20.

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

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24 1.1o. Farm Bureau, 199 F.3d at 1233-34; United States v. Mclattrick, 142 F.3d 1170, 1172 (9th Cir. 1998).


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

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


30 Id.
cies and beavers.\textsuperscript{31} Wolf predation of nettlesome coyotes has helped resuscitate numbers of the magnificent pronghorn antelope.\textsuperscript{32}

In 2003, after the population first satisfied the numeric prong of the 1994 EIS, FWS asked Idaho, Montana, and Wyoming to prepare wolf management plans that stated the regulatory methods each state would deploy to guarantee the continued viability of their populations above the minimum recovery baselines (at least thirty breeding pairs and 300 individual wolves).\textsuperscript{33} The Service required approval of each state’s plan as a precondition to delisting.\textsuperscript{34} FWS approved the Montana and Idaho plans in 2004.\textsuperscript{35} Wyoming was a different story.\textsuperscript{36} The state wrote a daringly recalcitrant plan, which was rejected by FWS in 2004.\textsuperscript{37} In a quick reversal, however, FWS approved a retooled version in 2007.\textsuperscript{38}

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

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

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} 2007 Rule, 72 Fed. Reg. at 6128.
\textsuperscript{38} 2008 Rule, 73 Fed. Reg. 10,514, 10,549-51 (Feb. 27, 2008).
\textsuperscript{40} \textit{See} \textit{Defenders of Wildlife}, 565 F. Supp. 2d at 1160.
\textsuperscript{41} \textit{Id.} at 1178.
\textsuperscript{42} \textit{See} Matthew Brown, \textit{Wolves Are Back on Endangered List in Northern Rockies}, Assoc. PRESS, Oct. 15, 2008.
\textsuperscript{43} Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wild-
week Barack Obama was elected president of the United States.\textsuperscript{44} Two days after his inauguration, President Obama suspended the proposed delist rule, and ordered the rule unpublished pending review by the incoming Secretary of Interior.\textsuperscript{45} To the consternation of many Obama supporters,\textsuperscript{46} however, FWS issued another final rule, the 2009 Rule, delisting wolves in the Northern Rocky Mountains—this time excluding Wyoming.\textsuperscript{47} On June 2, 2009, the same environmental groups filed a complaint challenging the legality of the 2009 Rule, in the same court, before the same judge.\textsuperscript{48}

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


\textsuperscript{44} Adam Nagourney, \textit{Obama Elected President as Racial Barrier Falls}, N.Y. TIMES, Nov. 4, 2009, at A1.


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

\textsuperscript{47} 2009 Rule, 74 Fed. Reg. at 15,123.


\textsuperscript{49} See infra notes 55–425 and accompanying text.

\textsuperscript{50} See infra notes 55–91 and accompanying text.

\textsuperscript{51} See infra notes 92–155 and accompanying text.

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

\textsuperscript{53} See infra notes 156–301 and accompanying text.

\textsuperscript{54} See infra notes 301–425 and accompanying text.
I. THE ENDANGERED SPECIES ACT

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

A. Definitions and the Section 4 Listing Process

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

\textsuperscript{55} See Bruce Babbitt, The Endangered Species Act and "Takings": A Call for Innovations Within the Terms of the Act, 24 Env'l. L. 355, 356 (1994).

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

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


\textsuperscript{60} See id. § 1532.

\textsuperscript{61} Id. § 1532(3).

\textsuperscript{62} Id. § 1532(20). A species is “threatened” when it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id.
out all or a significant portion of its range." The provision defines "species" as any "subspecies of fish or wildlife or plants, and any distinct population segment ("DPS") of any species of vertebrate fish or wildlife which interbreeds when mature." Congress did not define the term DPS, but FWS has since denominated DPSs by geographic boundaries based on the discreteness of the species within those bounds and how imperiled the population remains compared to the species in its overall range. In 1996, FWS authored a policy that states the purpose of the DPS as conservation tool for listing subspecies that qualify for protection in a discrete geographic region, even if not imperiled in its entire range. FWS stated the DPS tool should be utilized to prevent a "large-scale decline" that would necessitate a broader listing.

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

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63 Id. § 1532(6).
64 See id. § 1532(16) (emphasis added). When the ESA was originally enacted in 1973, the definition of the term species included only "species, subspecies or any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." See Humane Soc'y v. Kempthorne, 579 F. Supp. 2d 7, 11 (D.C. Cir. 2008).
66 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996) [hereinafter DPS Policy]; see Humane Soc'y, 579 F. Supp. 2d at 12. Under this policy, FWS announced three factors it would consider in deciding whether to designate a DPS: (1) the discreteness of the population in relation to the remainder of the taxon to which it belongs; (2) the significance of the population to the taxon; and (3) the conservation status of the population segment in relation to the ESA's standards for listing. DPS Policy, 61 Fed. Reg. at 4725.
67 Id. (stating the DPS permits FWS to "conserve species and ecosystems upon which they depend before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range").
69 Id. The five listing factors are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) over utilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Id.
70 Id.
71 Id. § 1533(b)(1)(A).
Unlike many regulatory statutes, economic considerations are flatly impermissible. Just as FWS is tasked with listing imperiled species, so too must it remove (i.e., delist) them when the species is adequately recovered in light of the Section 4(a) factors and the best scientific and commercial data. Since the presence of one factor justifies listing, a species shall not be delisted if even one of the five Section 4(a) factors is present; in other words, an affirmative showing of any factor dispositively mandates continued listing. Section 4(f) is the instrument for developing and implementing an enforceable recovery plan for each listed species. Finally, Section 11(c) confers jurisdiction on the U.S. District Courts for any suits arising under the ESA.

B. Section 10(j) Experimental Populations

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

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73 See id.; see also id. § 1533(f)(A) (ordering FWS to give priority to endangered species above “construction or other development projects or other forms of economic activity”).
74 Id. § 1533(c)(2)(ii)–(iii).
75 See 16 U.S.C. § 1533(c)(2); Factors for Listing, Delisting or Reclassifying Species, 50 C.F.R. § 424.11(d) (1984); Schulte, supra note 1, at 543.
76 16 U.S.C. § 1533(f)(1)(B)(ii). The provision commands the Service to include in each recovery plan “objective, measurable criteria, which, when met, would result in a determination . . . that the species be removed from the list.” Id.
77 See 16 U.S.C. § 1540(c), (g) (2006). Section 6 is also of note, as it allows FWS “to enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species.” Id. § 1535(b) (2006).
78 See H.R. CONF. REP. No. 97-855, pt. 6, at 29 (1982) (stating Section 10(j) “addresses the concerns of private landowners who are faced with having otherwise lawful actions not requiring federal permits prevented by Section 9 prohibitions against taking”).
The nonessential designation greatly relaxes the rigors of the ESA and invites FWS to draft recovery plans for reintroduced populations with a host of regulatory flexibility. Section 10(j) appears to be a compromise aimed at endangered, but predatory species, like the wolf, that menace domesticated animals and enrage local ranching interests. Indeed, gray wolves in Idaho, Montana, and Wyoming are a Section 10(j) nonessential experimental population. And indeed, since reintroduction, state and federal wildlife managers have killed hundreds of wolves after confirmed depredation of a domestic animal.

81 Id. § 1539(j)(1).
82 See id.
83 See id.; Special Rules—Vertebrates, 50 C.F.R. § 17.84 (1994).
85 Id. § 1539(j)(2)(C).
86 See id. § 1539(10)(j)(2)(B), (C)(i); 50 C.F.R. § 17.81-.82; see also 50 C.F.R. § 17.84(i) (establishing special rules pursuant to Section 10(j) for gray wolves, including permissible takes for livestock owners in certain defense of property circumstances).
87 H.R. REP. No. 97-835, pt. 6, at 28-29. In fact, in one of the few challenges to the validity of the Section 10(j) provisions, the U.S. Court of Appeals for the Ninth Circuit wrote "Congress' specific purpose in enacting section 10(j) was to 'give greater flexibility to the Secretary.'" McKittrick, 142 F.3d at 1174.
88 See H.R. REP. No. 97-835, pt. 6, at 28-29.
90 See 2008 Rule, 73 Fed. Reg. 10,514, 10,531 (Feb. 27, 2008). In response to fierce opposition to wolf reintroduction, the environmental group Defenders of Wildlife established the Bailey Wildlife Foundation Proactive Carnivore Conservation Fund, which has paid more than $1 million to ranchers and shepherders in Idaho, Montana, and Wyoming for the loss of 1,141 head of cattle and 2,113 sheep. DEFENDERS OF WILDLIFE, WOLF COMPENSATION
Although the Section 10(j) compromise certainly cleared the regulatory thicket for gray wolf reintroduction in the Northern Rocky Mountains, it hardly plucked any of the political thorns.91

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

In 1980, FWS approved a recovery plan for the Northern Rocky Mountain gray wolf pursuant to Section 4(f)92 of the ESA.93 In 1987, FWS revised the recovery criteria, and invited public involvement.94 By 1994, the reintroduction effort still was stalled in the internecine workings of the Department of the Interior, frustrated by political wrangling among conservationists, ranching interests, and reluctant state governments.95 That year, FWS published the 1994 EIS on gray wolf reintroduction.96 With that, the Agency enacted a rule establishing a nonessential experimental population of gray wolves in Idaho, Montana, and Wyoming—finalizing the release of wolves back into the Northern Rockies.97 This Part discusses the recovery criteria delineated in the 1994 EIS; Idaho’s, Montana’s, and Wyoming’s respective wolf manage-
ment plans effective upon delisting; and the particulars of FWS's 2008 Rule. 98

A. The 1994 EIS

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

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

98 See infra notes 99-155.
99 See Wolf Recovery Plan, supra note 94, at v. In addition to the absence of all ESA Section 4(a) factors, the following numeric and temporal criteria were to be met: "for three consecutive years, a minimum of ten breeding pairs are documented in each of the three recovery areas [in Montana, Idaho, and Wyoming]." Final Rule Reclassifying and Removing the Gray Wolf from the List of Endangered and Threatened Wildlife and Establishing Two Special Regulations for Threatened Gray Wolves; 68 Fed. Reg. 15,804, 15,818 (2003), invalidated by Defenders of Wildlife v. Secretary, U.S. Dep't. of Interior, 354 F. Supp. 2d 1156, 1170-71 (D. Or. 2005).
100 GRAY WOLF FINAL EIS, supra note 8, app. 9, at 42. The criteria were revised after review of a survey of leading wildlife biologists. Id.
101 Genetic connectivity is defined as genetic exchange (outbreeding) between isolated populations of wolves in the three core recovery areas. Id.; see Defenders of Wildlife v. Hall, 565 F. Supp. 2d, 1160, 1168.
102 GRAY WOLF FINAL EIS, supra note 8, app. 9, at 42.
103 Id. The 1994 EIS emphasized the importance of genetic connectivity: "It is fairly clear that ten breeding pairs in isolation [in each of Montana, Idaho, and Wyoming] will not comprise a 'viable' population (i.e., have a high probability of survival for a long period without human intervention)." Id.
105 Id. at 60,255-56.
106 See 50 C.F.R. § 17.84(i) (1994).
or tribal\textsuperscript{107} wildlife managers to take problem wolves that harass, bite, attack, or kill agricultural property.\textsuperscript{108} The manner of these takings is discretionary, but has included methods across the continuum from relocating a problem wolf deeper into the wilderness to trapping to aerial gunning from helicopters and fixed wing airplanes.\textsuperscript{109} Private landowners are permitted to kill or injure a wolf, but only if it is caught in the act of harassing, wounding, or killing livestock.\textsuperscript{110}

B. State Wolf Management Plans

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

\textsuperscript{107} Several sovereign American Indian tribes living in Montana, Idaho and Wyoming, including the Nez Perce in Idaho and the Blackfoot in Montana, have a hand in shaping wolf-recovery policy. See \textit{Gray Wolf Final EIS, supra note 8, at vii.}

\textsuperscript{108} 2008 Rule, 73 Fed. Reg. 10,514, 10,531 (Feb. 27, 2008).

\textsuperscript{109} Id.

\textsuperscript{109} 50 C.F.R. \textsection 17.84(i) (3) (ii).

\textsuperscript{110} It took five years for the gray wolf populations in the three recovery areas to exceed the numeric margin. 2007 Rule, 72 Fed. Reg. 6106, 6108 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17). The population exceeded the target again in each year between 2001 and 2006. Id. In 2006, censuses counted 22 breeding pairs and 283 wolves in Montana, 42 breeding pairs and 650 wolves in Idaho, and 25 breeding pairs and 310 wolves in Wyoming, for a total of 1243 wolves in the Northern Rocky Mountain region. Id. The number of wolves increased again, to about 1545 wolves in 2007. See Brown, \textit{supra} note 42. The 2008 census showed the pace of population growth slowing to eight percent for a total of 1645 wolves (846 in Idaho, 497 in Montana, and 302 in Wyoming). See Matthew Brown, \textit{Wolf Numbers up Again in Northern Rockies but Expansion Slowing}, ASSOC. PRESS, Mar. 17, 2009.

\textsuperscript{112} See 2007 Rule, 72 Fed. Reg. at 6108.


\textsuperscript{114} 2007 Rule, 72 Fed. Reg. at 6126.
The Montana Fish, Wildlife, & Parks Department's ("MFWP") management plan regulates wolves as big game animals. In Montana, big game status imposes criminal and civil penalties on any party that takes a wolf, but provides key exemptions for public hunts regulated by MFWP and for defense of property (e.g., livestock). MFWP only committed to maintaining a safety margin of fifteen breeding pairs and 150 wolves at all times, but stated without numerical reference that it would maintain a "biologically sustainable" population. Aside from permissible takes, only MFWP predator control officers can kill wolves in response to confirmed depredation of livestock. The Montana, Fish, Wildlife & Parks Commission, a body appointed by the governor, assumes authority to set wolf seasons and mortality limits for public hunts. In 2008, the Montana Legislature passed a public hunt limit for as many as 130 wolves in year one—roughly one-third of the state's more than four hundred wolves. The hunt was forestalled by the grant of a preliminary injunction in Defenders of Wildlife. After the 2009 Rule, MFWP set a lower wolf mortality quota for the fall public hunt—seventy-five wolves.

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

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115 Mont. Fish, Wildlife, & Parks Dep't, Montana Final Environmental Impact Statement 79 (2004). Other big game animals in Montana include elk, moose, black bears, and mountain lions. Id.
116 See id.
117 Id. at 8, 109.
118 Id. at 81.
119 Id. at xii.
121 See 565 F. Supp. 2d at 1178.
124 Id. at 29.
125 Id. at 19.
126 Id. at 1.
quotas set by the Idaho Fish & Game Commission ("IFGC"), a politically appointed body.\textsuperscript{127} Illegal takes are punishable by criminal and civil penalties enacted into the Idaho Code. In May 2008, IFGC announced a wolf-hunting season for the fall and winter of 2008, which allotted permits to kill 428 of the state’s more than eight hundred wolves within the year.\textsuperscript{128} The hunt was forestalled by the district court’s grant of injunctive relief.\textsuperscript{129} In 2009, after delisting, the IFGC established a mortality quota for its first fall hunt at 220 wolves, about one-quarter of the state’s population at the time of the decision.\textsuperscript{130} The IFGC, by a four-to-three margin rejected a 430 wolf mortality limit.\textsuperscript{131}

Wyoming is a different story.\textsuperscript{132} In 2003, the Wyoming Legislature passed a statute affixing trophy\textsuperscript{133} status to wolf populations within YNP and the surrounding Grand Teton National Park ("GTNP"), Beartooth-Absaroka, Teton, and other federally protected wilderness areas.\textsuperscript{134} The law turns nettlesome in its classification of wolves outside the trophy lands—lands, which not coincidentally, interface more frequently with ranches, farms, grazing pastures, and oil and gas drilling sites.\textsuperscript{135} There, wolves are designated as predatory animals\textsuperscript{136} and fall under the jurisdiction of the Wyoming Department of Agriculture, rather than a wildlife agency.\textsuperscript{137} The state permits limitless killing of predatory animals by

\begin{itemize}
\item \textsuperscript{127} Id. at 1, 29.
\item \textsuperscript{129} See Defenders of Wildlife, 565 F. Supp. 2d at 1178.
\item \textsuperscript{130} Roger Phillips, Idaho Sets a Limit of 220 for Wolf Hunt, \textit{Idaho Statesman}, Aug. 18, 2009, at A5. IFGC expects roughly 70,000 hunters to receive tags to kill wolves, though they noted that hunting wolves is difficult. Id. The IFGC Commission Chairman, who voted for the 430-wolf threshold, said forestalling an injunction "played a role" in the lower 2009 quota. Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{133} The trophy classification is similar to the big game status envisioned in the Montana and Idaho management plans. See id. at 6128–32.
\item \textsuperscript{134} See \textsuperscript{id}. at 6132.
\item \textsuperscript{135} See \textsuperscript{id}. at 6129.
\item \textsuperscript{136} Wolves classified as "predatory"
\begin{quote}
\textit{may be taken by anyone, anywhere ... at any time, without limit, and by any means (including shoot-on-sight; baiting; possible limited use of poisons; bounties and wolf-killing contests; locating and killing pups in dens including use of explosives and gas cartridges; trapping; snaring; aerial gunning; and use of other mechanized vehicles to locate or chase wolves down).}
\end{quote}
\textsuperscript{id}. at 6129 (emphasis added).
\item \textsuperscript{137} Id.
an array of lethal measures.\textsuperscript{138} FWS rejected Wyoming's 2003 management plan under Section 4(a)(1)(D) of the ESA as inadequate to prevent excessive human-caused mortality.\textsuperscript{139}

C. The 2008 Rule

In February 2007, FWS issued a proposed delist rule\textsuperscript{140} that: (1) established a Northern Rocky Mountain Distinct Population Segment ("NRM DPS"), including wolves in the entireties of Montana, Idaho, and Wyoming, the eastern one-third of Washington and Oregon, and a sliver of north-central Utah, where episodic dispersers and one or two packs have migrated;\textsuperscript{141} and (2) removed gray wolves within the NRM DPS from federal ESA protection.\textsuperscript{142} The rule would grant Idaho and Montana absolute authority for wolf management under the framework of the plans already approved by FWS.\textsuperscript{143} The proposed rule preserved federally protected status for Wyoming wolves until the state adopted an adequate regulatory plan.\textsuperscript{144}

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

\textsuperscript{138} 2007 Rule, 72 Fed. Reg. at 6129.

\textsuperscript{139} Id. at 6131; see 16 U.S.C. § 1533(a)(1)(D) (2006).

\textsuperscript{140} See id. at 6128.

\textsuperscript{141} Id. at 6106-07.

\textsuperscript{142} See 2007 Rule, 72 Fed. Reg. at 6106.

\textsuperscript{143} See id. at 6128.

\textsuperscript{144} See id. at 6106.


\textsuperscript{146} Wyo. Game & Fish Comm'n, supra note 145, at 4, 10.

\textsuperscript{147} 2008 Rule, 73 Fed. Reg. at 10,549 (declaring "this plan, if implemented, will provide adequate regulatory protections to conserve Wyoming's portion of a recovery wolf population"). FWS supported its approval of Wyoming's plan by citing a study that the trophy areas support seventy percent of the state's suitable wolf habitat. Id. at 10,550.
the states;\textsuperscript{148} (2) determined that delisting was statutorily required because none of the ESA's Section 4(a) factors were present in the NRM DSM;\textsuperscript{149} and (3) concluded that the wolves in the NRM DPS met the measurable recovery criteria of the 1994 EIS.\textsuperscript{150}

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

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

The plaintiffs\textsuperscript{156} filed their complaint in Defenders of Wildlife v. Hall in the U.S. District Court for the District of Montana in Missoula, Montana, in April 2008.\textsuperscript{157} The remedy sought was declaratory and injunctive relief, primarily asking District Judge Donald W. Molloy to enjoin

\textsuperscript{148} Id. at 10,514.
\textsuperscript{149} Id.
\textsuperscript{150} Id. In explaining its analysis of the recovery targets in the 1994 EIS, FWS offered the caveat that "[the ESA] requires us to ensure a species is no longer threatened or endangered not that its viability would be theoretically maximized." Id.
\textsuperscript{152} 2008 Rule, 73 Fed. Reg. at 10,522.
\textsuperscript{153} Id.
\textsuperscript{154} Id.; GRAY WOLF FINAL EIS, supra note 8, app. 9, at 42.
\textsuperscript{155} See 2008 Rule, 73 Fed. Reg. at 10,514.
\textsuperscript{156} A coalition of eleven environmental groups, including named plaintiff Defenders of Wildlife, the National Resource Defense Council, the Sierra Club, and the Humane Society of the United States, challenged the FWS 2008 Rule. Complaint ¶¶ 10–13, Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160 (D. Mont. 2008) (No. 908CV00056). The defendants are H. Dale Hall, U.S. Fish & Wildlife Service Director; Dirk Kempthorne, U.S. Secretary of Interior; and FWS. Id. ¶¶ 25–27.
\textsuperscript{157} See 565 F. Supp. 2d at 1162.
FWS from delisting wolves in the NRM DPS.\textsuperscript{158} This Part argues that two FWS decisions—amounting to the legal backbone of the 2008 Rule—render the rule a fatally arbitrary and capricious exercise of agency authority.\textsuperscript{159} After a cursory synopsis of the political climate surrounding wolves and a brief primer on administrative law, this Part argues that the \textit{Defenders of Wildlife} order rightfully determined that FWS acted arbitrarily for two reasons: (1) lack of connectivity, and (2) inadequacy of the state regulatory mechanisms.\textsuperscript{160} First, the delisting of the NRM DPS, absent affirmative proof of genetic connectivity among the three subpopulations, impermissibly changed the Agency's own recovery standards without a reasoned explanation, as required by the doctrine espoused by the U.S. Supreme Court in 1983 in \textit{Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.}, which states that an agency may not reverse its own guiding policies without a "reasoned analysis."\textsuperscript{161} Second, and among other defects, the Agency's abrupt approval of Wyoming's 2007 wolf management plan contravened the inviolate commands of Section 4(a)(1)(D) of the ESA and the same controlling principles of administrative law.\textsuperscript{162}

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

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

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 163-301 and accompanying text.
\item See infra notes 163-301 and accompanying text.
\item See 463 U.S. 29, 41-44 (1983).
\item See \textit{Defenders of Wildlife}, 565 F. Supp. 2d at 1160 (listing the states of Idaho, Montana, and Wyoming and even Idaho Governor C.L. "Butch" Otter, as Defendant-Intervenors).
\item Id.
\item See, e.g., Dirk Kempthorne, Gov. of Idaho, Address at the University of California, Santa Barbara, Rx for the ESA: The Endangered Species Act at Thirty, 10 (Nov. 12, 2003) (on file with author). In 2009, wolves killed 601 cattle, sheep, llamas, dogs and other domestic animals, the most ever by forty percent. See Brown, supra note 111. Still, that represents about one domestic animal for every three wolves. See id. In the end, the political skirmish over wolves is about more than the periodic loss of agricultural property. It is something much bigger: how wolves' habitat is used. Environmentalists want the habitat jealously conserved. Opponents would tend to value economic interests like gas drilling, mining, logging, grazing, or commercial development. Federalism plays an important role,
\end{enumerate}
\end{footnotesize}
before his appointment to the Department of the Interior, Governor Kempthorne told a joint session of the Idaho Legislature: "[w]e won't stop until we make history by delisting wolves in Idaho."\(^{166}\) The change in presidential administration ushered in Secretary of Interior Ken Salazar, who unlike Kempthorne was not an outspoken opponent of gray wolf reintroduction.\(^{167}\) But, in appointing a fifth-generation cattle rancher, some wolf proponents sensed reason for concern with President Obama's selection.\(^{168}\) Indeed, though the 2009 Rule began under Kempthorne, it received Salazar's blessing.\(^{169}\)

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

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

\(^{169}\) Elperin, supra note 46, at A2.


\(^{171}\) Id.

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


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

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

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

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

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

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

179 *State Farm*, 463 U.S. at 43; *see also* 5 U.S.C. § 706(2)(A); Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962) (stating that agency “expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to become ‘a monster which rules with no practical limits on discretion’”); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L.
Lastly, the Court cautioned that reviewing courts are not permitted to review the record based on an attorney's "post hoc rationalizations," an administrative action is only to be upheld on the basis of the agency's original rationale.\textsuperscript{180}

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

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

1. Lack of Connectivity

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

a. Parties' Arguments

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

\textsuperscript{180} State Farm, 463 U.S. at 49–50.
\textsuperscript{181} See 565 F. Supp. 2d at 1178.
\textsuperscript{182} See id. at 1160–78.
\textsuperscript{183} See infra notes 186–301 and accompanying text.
\textsuperscript{184} \textsc{Gray Wolf Final EIS, supra note 8, app. 9, at 42.}
\textsuperscript{185} See 565 F. Supp. 2d at 1171.
\textsuperscript{186} See id. at 1169; \textsc{Gray Wolf Final EIS, supra note 8, app. 9, at 42.}
\textsuperscript{187} Bridgett vonHoldt et al., \textit{The Genealogy and Genetic Viability of Reintroduced Gray Wolves}, 17 \textsc{Molecular Ecology} 252, 254 (2008).
corridors of connectivity.\textsuperscript{188} The population in GYA, however, remained genetically and geographically isolated.\textsuperscript{189} The long-term extrapolation of genetic data forecasted increased losses of genetic variation and eventual inbreeding within sixty years.\textsuperscript{190} Plaintiffs capitalized on the vonHoldt Study, arguing that (1) delisting without proof of genetic exchange plainly contravened the Agency's own criteria for recovery in the 1994 EIS;\textsuperscript{191} and (2) the Agency offered no sufficiently reasoned explanation for abandoning its own recovery requirement of genetic exchange.\textsuperscript{192} In concert, these actions amounted to bald violations of the \textit{State Farm} principle and made the 2008 Rule an arbitrary and capricious exercise of agency power.\textsuperscript{193}

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

\textsuperscript{188} Id. at 257–58.
\textsuperscript{189} Id. at 257.
\textsuperscript{190} Id. at 269–70.
\textsuperscript{191} See \textit{Defenders of Wildlife}, 565 F. Supp. 2d at 1168–72; Plaintiffs' 2008 Complaint, \textit{supra} note 156, ¶ 57.
\textsuperscript{192} See \textit{Defenders of Wildlife}, 565 F. Supp. 2d at 1168–72; Plaintiffs' 2008 Complaint, \textit{supra} note 156, ¶ 57.
\textsuperscript{193} See 5 U.S.C. § 706(2) (2006); \textit{State Farm}, 463 U.S. at 43.
\textsuperscript{194} Defendants' Opposition to Motion for Preliminary Injunction at 10, \textit{Defenders of Wildlife}, 565 F. Supp. 2d at 1160 (No. 908CV00056).
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 5. Some reliable scientific estimates peg the number of dispersers into Wyoming at as few as four wolves, over the thirteen years since reintroduction, \textit{Defenders of Wildlife}, 565 F. Supp. 2d. at 1170.
\textsuperscript{197} Defendants' Brief, \textit{supra} note 194, at 5.
FWS also asserted that because the term "genetic exchange" is not defined in the 1994 EIS, genetic connectivity between all three of the subpopulations is not necessarily a mandatory precondition for delisting. In the alternative, the Service invoked State Farm, arguing that even if the recovery criteria has not been met, the 2008 Rule provided a "reasoned explanation" for the absence of the formerly required genetic connectivity. Therefore, FWS stated that the 2008 Rule guarantees the continued absence of all of the ESA Section 4(a) listing factors in conformity with the statute. Lastly, the Service pressed the court to grant substantial deference to its scientific expertise, particularly surrounding the decision to disregard its own vonHoldt Study. FWS argued that the study's predictions of inbreeding and increased juvenile mortality did not amount to the required best available scientific and commercial data. After dispensing with its own study, FWS claimed that in light of documented dispersals and the unreliability of the vonHoldt Study, genetic exchange likely already had occurred.

b. Analysis of Defenders of Wildlife's Findings

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

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

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199 Defendants' Brief, supra note 194, at 11.
200 See id. at 11-12. Again, this argument rests on the assumption that limited dispersal of lone wolves from Idaho and Montana and a strong genetic foundation of the Wyoming populations' founding pairs will provide adequate protection of the species. Id. at 5-13.
201 See id.
203 Defendants' Brief, supra note 194, at 12-13. FWS contends that there is likely already a genetic link because: (1) the study's predictive modeling represents a "worst-case scenario" based on unrealistic assumptions; (2) the model erred in capping the YNP wolf population at its winter nadir, not its springtime high; and (3) the study only examined wolves in the national park, not throughout the entire GYA. Defenders of Wildlife, 565 F. Supp. 2d at 1169.
204 Defendants' Brief, supra note 194, at 12-13.
205 See Gray Wolf Final EIS, supra note 8, app. 9, at 42.
206 Defenders of Wildlife, 565 F. Supp. 2d at 1169.
207 See id.
exchange between the subpopulations." This meta-population prong of is satisfied by the evidence, albeit scant, of dispersers from Idaho and Montana reaching the GYA region. The 1994 EIS's operative definitions, however, offer the caveat that a meta-population comprised of genetically isolated subpopulations would not be viable against unexpected environmental or stochastic events. The definition itself addresses the need for genetic variants to be mixed among the subpopulations. In its defense of delisting, though, FWS intentionally conflates the terms "meta-population" and "genetic exchange," even though the 1994 EIS emphasizes that the genetic requirement is in addition to a meta-population connected by mere dispersals. Therefore, evidence of dispersals is inapposite; the 1994 EIS does not require a meta-population where the subpopulations merely interact. The requirement is two-tiered and absolute: there must be a meta-population that displays genetic exchange. The decision in Defenders of Wildlife, however, does not provide as much analytic depth. Rebuffing FWS's argument that genetic exchange is not defined in the 1994 EIS, the court wrote that the term genetic exchange only has one permissible construction: actual exchange of genetic material between the subpopulations.

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208 Gray Wolf Final EIS, supra note 8, app. 9, at 59. The definition of a "meta-population" is provided as follows:

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

209 See Gray Wolf Final EIS, supra note 8, app. 9, at 39; vonHoldt et al., supra note 187, at 257.

210 Gray Wolf Final EIS, supra note 8, app. 9, at 39.

211 See id.

212 Defendants’ Brief, supra note 194, at 9-11; see Gray Wolf Final EIS, supra note 8, app. 9, at 42.

213 See Gray Wolf Final EIS, supra note 8, app. 9, at 39, 42; see also Defendants’ Brief, supra note 194, at 11.

214 See Gray Wolf Final EIS, supra note 8, app. 9, at 39, 42.


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

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

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

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217 See id. at 1170; Plaintiffs’ Reply to Federal Defendants’ Preliminary Injunction Brief at 2–3, Defenders of Wildlife, 565 F. Supp. 2d at 1160 (No. 908CV00056).
218 Defenders of Wildlife, 565 F. Supp. 2d at 1168.
220 See Defendants’ Brief, supra note 194, at 12-13 (stating FWS’s position that its own vonHoldt Study is unreliable).
222 See Defenders of Wildlife, 565 F. Supp. 2d at 1171 (holding that “[t]he Service provides no new evidence or research to support its change of course”).
223 See Gray Wolf Final EIS, supra note 8, app. 9, at 42.
228 See id. § 1533(b)(1)(A), (d).
Finally, the repudiation of the vonHoldt Study is arbitrary and capricious under the State Farm doctrine requiring reasonable articulation of agency policy changes. FWS favors the possibility that genetic exchange has occurred over the statistically significant probability articulated in the vonHoldt Study. State Farm firmly counsels that an action is invalid if it is supported by an explanation that runs counter to the evidence before that agency. Without a contrary showing, FWS's projection that genetic exchange might have occurred is embarrassingly contradicted by the Service's own vonHoldt Study. The State Farm alarm bells ring through every tepid justification by FWS for rejecting the vonHoldt Study. Judge Molloy rightfully refused to accept FWS's jettison of the vonHoldt Study. He found no flaw with the study's statistical significance, and neither does FWS. Also, the judge was troubled by evidence showing only four to twelve documented dispersals into Wyoming in thirteen years. The judge acceded that the low number of dispersals, bolstered even further by the vonHoldt Study's findings, represents compelling evidence that genetic exchange had yet to occur.

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

FWS invoked State Farm to support its decision to forgo the 1994 EIS's genetic exchange criteria, arguing that it had provided a reasoned explanation. Hypothetically, if the 2008 Rule cited new scientific findings that episodic dispersers are a better barometer of population viability than genetic diversity, or a contrary showing of genetic mixing, these likely would represent reasoned explanations for the sudden insuperability of the 1994 EIS. Instead, the 2008 Rule addresses the policy detour by discussing documented dispersals into the GYA, and
then defends the decision at trial with the post hoc rationalization that smaller wolf populations have survived in isolation for decades. But, *State Farm* sets clear parameters: decisions are reviewed based on the agency’s own explanations, not ex post facto rationalizations in the courtroom.

The preliminary injunction might have been granted without more discussion beyond a dismissal of FWS’s facially immaterial post hoc rationalization, but, FWS’s ex post facto explanations can be dismantled just as readily. FWS, in 1987, published a recovery target based purely on a numerical abundance. Yet, in 1994, FWS added a genetic component to reflect the consensus recommendation of wildlife biologists. Beyond that, FWS reaffirmed the two pronged numeric and genetic criteria as recently as 2002. FWS’s explanation for the about-face—its stated optimism that future dispersers will genetically mix—is so boldly unpersuasive that it cannot objectively be considered “reasoned” under the *State Farm* test.

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

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240 2008 Rule, 73 Fed. Reg. 10,514, 10,553 (Feb. 27, 2008) (stating that lack of genetic connectivity is not a threat “because other wolf populations have persisted at lower levels and with lower genetic diversity for decades or centuries”).
241 463 U.S. at 50 (citing *Burlington Truck Lines*, 371 U.S. at 168).
242 See *State Farm*, 463 U.S. at 50 (citing *Burlington Truck Lines*, 371 U.S. at 168); 2008 Rule, 73 Fed. Reg. at 10,553.
243 See *Defenders of Wildlife*, 565 F. Supp. 2d at 1170 (holding FWS “provides no persuasive reasons for this change in course that were not known in 1994, when the new criteria were established, or in 2001 and 2002, when the criteria were reaffirmed”).
244 See *Wolf Recovery Plan*, supra note 94, at v-vi.
245 *Gray Wolf Final EIS*, supra note 8, app. 9, at 42.
246 2008 Rule, 73 Fed. Reg. at 10,553; Defendants’ Brief, supra note 194, at 5, 10.
250 See *Idaho Dep’t of Fish & Game*, supra note 123, at 18; *Mont. Fish, Wildlife, & Parks Dep’t*, supra note 115, at 109; *Wyo. Game & Fish Comm’n*, supra note 145, at 10, 15.
The argument fails a keystone requirement of administrative law: that the agency demonstrate a rational connection between the facts found and the choice made.252

2. Adequacy of the State Regulatory Mechanisms

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

a. The Parties’ Arguments

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

251 See Defenders of Wildlife, 565 F. Supp. 2d at 1172 (stating “[t]he change of course is especially problematic in this case because delisting will undeniably reduce the chances for future genetic exchange”).
252 State Farm, 463 U.S. at 43 (citing Burlington Truck Lines, 371 U.S. at 168).
254 See 565 F. Supp. 2d at 1172–76.
255 Plaintiffs’ 2008 Complaint, supra note 156, ¶ 60.
259 Id.
state plan. Plaintiffs correctly contended that (1) the 2008 Rule violates ESA Section 4(a)(1)(D); and (2) FWS's reversals of position on the sufficiency of the Wyoming plan's numeric differentiation between national park and non-national park boundaries, and the bifurcation of trophy game and predatory animal regions, cannot pass muster under *State Farm*. For its part, FWS argued that the 2007 plan cures all defects from the prior framework. FWS stated that the nominally expanded trophy area represents seventy percent of the state's suitable wolf habitat. Despite the contradictory statutory language, FWS also argued that the trophy area is fixed because the 2007 plan clearly identifies the borders in a map addendum. To combat the difficulties of numeric bifurcation, FWS points to new language in the 2007 plan that pledged Wyoming's commitment to maintain fifteen breeding pairs in the state—eight in the national parks and at least seven in the expanded trophy game area outside YNP and GTNP. This pledge comes in the form of a certification by the state Attorney General attesting that Wyoming law will be interpreted to maintain fifteen breeding pairs statewide. Thus, the Service argued, ESA Section 4(a)(1)(D) is not contravened and the regulatory apparatus does not imperil the long-term viability of wolves.

b. Analysis of Defenders of Wildlife's Findings

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

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

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250 See Plaintiffs' 2008 Complaint, *supra* note 156, ¶ 60.
251 See id.
254 Id. at 10,549.
255 Defendants' Brief, *supra* note 194, at 14 (arguing "[t]he 2007 Wyoming plan clearly identifies the borders of the trophy game area in Figure 1").
258 Id. at 13-14.
was inadequate pursuant to ESA Section 4(a)(1)(D). The 2007 plan does not cure either of these defects.

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

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

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


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


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


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

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

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

\textsuperscript{280} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} WYO. GAME & FISH COMM'N, supra note 145, at 10; Defendants' Brief, supra note 194, at 14.
\textsuperscript{284} 2007 Rule, 72 Fed. Reg. at 6131 (stating "[t]he potential success of [the Wyoming plan] . . . is greatly dependent on YNP having at least eight breeding pairs. However, recent experience tells us this is an unrealistic expectation").
\textsuperscript{285} Id.
\textsuperscript{286} See 16 U.S.C. § 1533(a)(1)(D) (2006); Miller, supra note 170, at Al.
\textsuperscript{287} See 16 U.S.C. §§ 1533(a)(1)(D), (f).
\textsuperscript{288} See, e.g., Wyo. STAT. ANN. § 23-1-304(a) (2008).
\textsuperscript{289} Id.
\textsuperscript{290} Id.; 2007 Rule, 72 Fed. Reg. at 6129-31.
2005, the *Defenders of Wildlife* court rightfully held that this framework is an inadequate regulatory mechanism.291

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

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

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

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293 *Defenders of Wildlife*, 565 F. Supp. 2d at 1174.
296 *See id.*
297 *Schulte, supra note 1, at 545-46.*
298 *See* 2008 Rule, 73 Fed. Reg. at 10,557 (stating “[w]hile wolves historically occurred over most of the NRM DPS, large portions of this area are no longer able to support viable wolf populations or breeding pairs”).
from its 2003 policies are unreasoned, and clearly merit reversal under the *State Farm* formula.\(^{501}\)

### IV. The 2009 Rule: Same Old Defects, Brand New Problems

Just two weeks after issuance of the injunction, FWS opened a comment period on another proposal to delist gray wolves.\(^{502}\) Despite a brief suspension by the Obama administration, FWS delisted wolves in the NRM DPS on April 2, 2009, except in Wyoming where wolves remained listed under ESA Section 10(j) status.\(^{503}\) The same coalition of environmental groups that successfully invalidated the 2008 Rule in *Defenders of Wildlife v. Hall* filed suit challenging the 2009 Rule, in the same court before the same judge.\(^{504}\) This Part argues that the 2009 Rule repeats the same errors as the 2008 Rule, while introducing several new defects, and like its predecessor must be invalidated as arbitrary and capricious.\(^{505}\) After a brief synopsis of the 2009 Rule, this Part shows that FWS failed to demonstrate sufficient scientific evidence of genetic linkage among the subpopulations, as required by the recovery criteria in the Agency’s own 1994 EIS.\(^{506}\) Moreover, the ESA forbids FWS to continually rely on human-assisted genetic exchange after delisting.\(^{507}\) Like the 2008 Rule, the 2009 Rule is defective on the grounds that the Idaho and Montana regulatory mechanisms are inadequate.\(^{508}\) Both states adopted wolf management plans that carry no legal force and adopted overbroad defense of property statutes that theoretically allow limitless wolf mortality.\(^{509}\) Finally, this Part concludes that the 2009 Rule further contravened the inviolate language of the ESA by (1) simultaneously designating and delisting the NRM DPS; and (2) making a listing distinction within a DPS, a practice barred by the U.S. Court of Appeals for the Ninth Circuit.\(^{510}\)

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\(^{501}\) *Defenders of Wildlife*, 565 F. Supp. 2d at 1174 (holding the decision is arbitrary and capricious because “[t]he Service here too decides without explanation”); see also *State Farm*, 463 U.S. at 41–44.


\(^{503}\) Id.; see *Byron*, supra note 45, at A1.

\(^{504}\) Plaintiffs’ 2009 Complaint, supra note 29, ¶¶ 4–20.

\(^{505}\) See infra notes 311–425 and accompanying text.

\(^{506}\) See infra notes 312–339 and accompanying text.

\(^{507}\) See infra notes 340–349 and accompanying text.

\(^{508}\) See infra notes 350–375 and accompanying text.

\(^{509}\) See infra notes 350–375 and accompanying text.

\(^{510}\) See infra notes 376–425 and accompanying text.
A. The 2009 Rule: Genetic Exchange and Wyoming Problems Addressed

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

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

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

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312 Id. at 15,133–35, 15,175. Wolves captured and translocated into the GYA from the Sawtooth Mountains in central Idaho and parts of Montana also have bred with wolves in the GYA subpopulation, according to the 2009 Rule. Id. at 15,133, 15,175.
313 Id.
315 See id. at 15,133.
316 Id. at 15,134 (stating "human assisted "[r]elocations of the mere presence of dispersing wolves was believed to be adequate proof of connectivity").
317 Id.
the surrounding wilderness, refused to sign.318 Separately, in response to the conclusion in *Defenders of Wildlife* that Wyoming’s wolf management framework constituted an inadequate regulatory mechanism under Section 4(a)(1)(D), FWS functionally excises Wyoming from the scope of the 2009 Rule.319 FWS packages several different decisions into its 2009 Rule: FWS identifies the same existing NRM DPS from the 2008 Rule and delists the NRM DPS, but at the same time retains the Section 10(j) status for wolves within the political boundaries of Wyoming.320

**B. Lack of Connectivity**

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

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

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

318 *Id.*
319 See *id.* at 15,123.
324 See *id.* § 1533(b)(1)(A).
325 vonHoldt et al., *supra* note 187, at 257.
cal expertise is necessarily involved in the decision-making. In fact, an agency’s decision pursuant to the ESA may permissibly be founded on the “best” scientific data even if the administrative record contains evidence for and against its decision.

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

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328 Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008).
330 Id.
331 Lands Council, 537 F.3d at 993.
335 See id.
336 See id.
337 Id.
it is arbitrary and capricious in light of Congress' intent in enacting Section 4(b)(1)(A) of the ESA.\textsuperscript{339}

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

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

Section 2(b) declares, inter alia, that the purpose of the ESA is to provide a program for the conservation of endangered species.\textsuperscript{342} The ESA does recognize that conservation of listed species may be facilitated by artificial means\textsuperscript{343} and defines conservation to include “propagation, live trapping, and transplantation.”\textsuperscript{344} Conservation is defined as “bring[ing] any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.”\textsuperscript{345} Therefore, as the U.S. Court of Appeals for the Ninth Circuit has affirmed, Congress, in passing the ESA, intended human-assisted migration and other artificial propagation measures only to “promote populations that are self-sustaining without human

\begin{itemize}
\item \textsuperscript{339} See 16 U.S.C. § 1533(b)(1)(A); \textit{State Farm}, 463 U.S. at 43.
\item \textsuperscript{340} 2009 Rule, 74 Fed. Reg. at 15,133–34.
\item \textsuperscript{341} See 16 U.S.C. § 1531(b) (2006) (“The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species.”); see also 16 U.S.C. § 1532 (2006) (“The terms “conserve,” “conserving,” and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.”).
\item \textsuperscript{342} \textit{Id.} § 1531(b).
\item \textsuperscript{343} Section 10(j), under which gray wolves are classified, allows for reintroduction of an extinct species into its native habitat, which is inarguably an artificial measure. See 16 U.S.C. § 1539(j) (2006).
\item \textsuperscript{344} \textit{Id.} § 1532(3).
\item \textsuperscript{345} \textit{Id.}
interference."346 As the court stated, "the ESA's primary goal is to preserve the ability of natural populations to survive in the wild."347 As such, delisting of gray wolves is premature because, as FWS acknowledges, the population likely still requires human-assisted migration to meet its own genetic recovery criteria.348 When artificial measures are still needed, the species must remain listed because the signature goal of conservation under the ESA is to obviate, not perpetuate, further recovery measures.349

C. Adequacy of the State Regulatory Mechanisms

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

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

346 See Trout Unlimited v. Lohn, 559 F.3d 946, 957 (9th Cir. 2009) (holding that rule downlisting a DPS of naturally-spawned and fishery-hatched Upper Columbia River steelhead from endangered to threatened was not arbitrary and capricious because the sophisticated rule provided adequate triggers to ensure that naturally-spawned steelhead remained listed, even hatchery-born steelhead became abundant such that ESA's clear command to preserve natural populations was not contravened).
347 See id.
349 See 16 U.S.C. § 1532(3); Trout Unlimited, 558 F.3d at 957.
350 See Defenders of Wildlife, 545 F. Supp. 2d. at 1172-76; infra notes 409-425 and accompanying text.
351 See Plaintiffs' 2008 Complaint, supra note 156, ¶ 60.
352 See Plaintiffs' Reply Brief, supra note 217, at 5-7.
353 See Plaintiffs' 2008 Complaint, supra note 156, ¶ 60.
4(a)(1)(D). The plans, respectively, were written by IDFG and MFWP. Both IDFG and MFWP make important promises: Idaho pledged to maintain a wolf population between 518 and 732 (the lower and upper bounds of the 2005 and 2007 levels), while Montana promised to support a biologically sustainable population. These are promises, however, that IDFG and MFWP do not have the legal authority to make. Rather, IFGC and the Montana Fish, Wildlife and Parks Commission ("MFWPC") each assume legal authority to set wolf mortality quotas and hunting seasons, and each are only legally bound to manage a 15-breeding pair and 150-wolf minimum. Both commissions are politically appointed. Although the IFGC and MFWPC both ratified their states' wolf management plans, they are not only free to depart from their recommendations, but have already done so.

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

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355 IDAHO DEP'T OF FISH & GAME, supra note 123, at 1; MONT. FISH, WILDLIFE, & PARKS DEP'T, supra note 115, at i.
356 IDAHO DEP'T OF FISH & GAME, supra note 123, at 1; MONT. FISH, WILDLIFE, & PARKS DEP'T, supra note 115, at 109.
357 See Plaintiffs' 2008 Complaint, supra note 156, ¶ 60.
358 IDAHO DEP'T OF FISH & GAME, supra note 123, at 1, 29; MONT. FISH, WILDLIFE, & PARKS DEP'T, supra note 115, at xii. Suzanne Asha Stone of Defenders of Wildlife phrased it quite aptly in a press release criticizing IFGC's 2009 decision to set a fall hunt for 220 wolves:

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

359 IDAHO DEP'T OF FISH & GAME, supra note 123, at 1, 29; MONT. FISH, WILDLIFE, & PARKS DEP'T, supra note 115, at xii.
360 See Idaho DEP'T OF FISH & GAME, supra note 123, at 1; MONT. FISH, WILDLIFE, & PARKS DEP'T, supra note 115, at i; Plaintiffs' 2008 Complaint, supra note 156, ¶ 60.
361 Press Release, Idaho Fish & Game Comm'n, F & G Commission Adopts Wolf Hunting Rules (May 22, 2008). The IFGC set the quota at 220 wolves for the Fall 2009 hunt; however, the lower number may belie IFGC's true intent. See Phillips, supra note 130, at A5; see also supra note 130.
the wolf management plan to maintain wolves at least at 2005 levels.\textsuperscript{362} Idaho's wolf management plan makes promises the IFGC refuses to keep, which renders FWS's reliance on the non-binding plans hollow.\textsuperscript{363} Therefore, these illusory promises are inadequate regulatory mechanisms to justify delisting under ESA Section 4(a)(1)(D), and as such, the 2009 Rule should be enjoined.\textsuperscript{364}

Idaho's\textsuperscript{365} and Montana's applicable defense of property statutes impose no upper bound on the number of wolves that can be killed to protect domestic animals.\textsuperscript{366} These overbroad defense of property laws contain no safety valve that triggers more stringent regulation in the event that populations diminish below the 15-breeding pair and 150-wolf numeric minima.\textsuperscript{367} Like Wyoming's seven or fifteen criteria, these similarly limitless laws render the states' regulatory mechanisms inadequate under ESA Section 4(a)(1)(D).\textsuperscript{368} Idaho and Montana make promises that the controlling language of their state statutes fails to support.\textsuperscript{369} The defense of property laws create an avenue for unregulated, unlimited wolf killing by private citizens, and that should per se violate ESA Section 4(a)(1)(D).\textsuperscript{370} On their face, the laws sound unlikely to threaten the viability of wolves, but limitless killing, if carried to its theoretical maximum, would imperil the long-term viability of

\textsuperscript{362} See IDAHO DEP'T OF FISH & GAME, supra note 123, at 1.
\textsuperscript{363} See id.; Press Release, Idaho Fish & Game Comm'n, supra note 361.
\textsuperscript{365} Idaho's laws are more troubling than those in Montana. Idaho's defense of property laws permit private citizens to kill wolves in a far broader range of situations than the current federal rules, including when wolves are worrying or annoying livestock. See IDAHO CODE ANN. § 36-1107(c) (2008) ("Wolves may be disposed of . . . when [they] are molesting or attacking livestock or domestic animals and it shall not be necessary to obtain any permit. . . . [M]olesting' shall mean the actions of a wolf that are annoying, disturbing or persecuting, especially with hostile or injurious effect, or chasing, driving, flushing, [or] worrying . . . to domestic animals."). The federal implementing regulation allows a defensible taking only when a wolf is in the act of attacking a domestic animal. 50 C.F.R. § 17.84(n)(3) (The "act of attacking" is defined in the code as "actual biting, wounding, grasping, or killing of livestock or dogs, or chasing, molesting or harassing by wolves that would indicate to a reasonable person that such [activities] are likely to occur at any moment").
\textsuperscript{366} See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1) (2007), amended by Act of Apr. 17, 2009, ch. 294, 2009 Mont. Laws (prohibiting the feeding of certain wildlife); GRAY WOLF FINAL EIS, supra note 8, app. 9, at 42.
\textsuperscript{367} Plaintiffs' Reply Brief, supra note 217, at 6.
\textsuperscript{369} See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).
\textsuperscript{370} See 16 U.C.S. § 1533(a)(1)(D).
wolves in spite of numeric management commitments in the non-binding wolf management plans. Because the laws allow theoretically unlimited wolf mortality, enforcement of the laws would have to be vigilant. There were troubling signs, however, from the brief delisting period before the preliminary injunction in *Defenders of Wildlife*. In a particularly egregious example, Idaho state regulators construed the state's defense of property law to insulate from prosecution a horse owner who killed a wolf after chasing it more than a mile on a snowmobile. On paper and in practice, the state laws allow too many wolf mortalities and are inadequate to ensure their viability under ESA Section 4(a)(1)(D).

D. DPS Designation and the Problem of Partial Delisting

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

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571 See *Id.*; IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).
572 See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).
573 See IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).
575 See 16 U.S.C. § 1533(a)(1)(D); IDAHO CODE ANN. § 36-1107(c); MONT. CODE ANN. § 87-3-130(1).
578 See infra notes 382–425 and accompanying text.
579 See infra notes 382–408 and accompanying text.
than listing a subspecies or DPS. Therefore, the 2009 Rule’s surgical excision of Wyoming wolves from the scope of delisting, if not the designation of the DPS itself, is an arbitrary violation of the letter and spirit of the ESA.

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

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

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380 See infra notes 408-425 and accompanying text.
381 See infra notes 382-425 and accompanying text.
383 Id.
384 On the same day FWS promulgated the rule delisting gray wolves in the western Great Lakes, it also issued the 2008 Rule, designating the NRM DPS, and delisting the DPS. See Humane Soc’y, 579 F. Supp. 2d at 9 n.2.
386 Humane Soc’y, 579 F. Supp. 2d at 20–21.
387 Id.
388 Id.
389 Id.
history firmly implies that a DPS designation may not be used simultaneously as a delisting instrument. 390

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

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

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395 See 16 U.S.C. § 1531(b) (2006) (stating that purpose of all provisions of the ESA is to conserve species).
396 Id. § 1533(c)(2)(B) (ordering the Secretary to review the “list of endangered and threatened wildlife” . . . which is in effect at the time of such review” every five years, and to list, delist or reclassify species (including DPSs) that are no longer in need of protection in light of the Section 4(a) factors); see also id. § 1533(a).
397 See id. §§ 1532(16), 1533(c)(2)(A)–(B); Humane Soc’y, 579 F. Supp. 2d at 17.
398 See 16 U.S.C. § 1533(c)(2)(A)–(B). Likewise, in such simultaneous DPS designation and delistings, the designated DPS has never been subjected to analysis under the five Section 4(a) factors, and thus, circumvents the ESA’s procedural and analytical mandates. See id. § 1533(a)(1)(A)–(E).
The plain language of the provision militates overwhelmingly in favor of the axiomatic proposition that Congress intended *listing* to be a precondition to *delisting*. OTHERWISE, the Secretary would not evaluate a list of endangered wildlife "in effect at the time of such review," but rather give new effect to the list for the purposes of skewing what Congress intended to be a symmetrical examination.

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

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

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

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399 See id. § 1533(c)(2)(A)–(B).
400 Id.
401 See id.
402 See id. § 1532(16).
403 Id.; *Humane Society*, 579 F. Supp. 2d at 17.
405 See id.; *Humane Society*, 579 F. Supp. 2d at 17.
409 See *Trout Unlimited*, 559 F.3d at 961; *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1161–62 (D. Or. 2001), aff'd, 319 F. App'x. 588 (9th Cir. 2009).
that FWS may not issue listing (or delisting) "distinctions below that of subspecies or a DPS of a species."\textsuperscript{410} This controlling Ninth Circuit authority affirmed a decision by the U.S. District Court for the District of Oregon in \textit{Alsea Valley Alliance v. Evans} that invalidated as "arbitrary and capricious" a National Marine and Fisheries Service ("NMFS") final rule listing "naturally spawned" coho salmon as threatened in the Oregon Coast DPS, while at the same time delisting nine hatchery populations within the same DPS.\textsuperscript{411} The Oregon district court, constraining NMFS's authority to the plain language of the ESA's definition of species,\textsuperscript{412} stated that the ESA only permits listing (and delisting) of an "entire species, subspecies or [DPS] of any species."\textsuperscript{413} Because NMFS considered more particularized listing criteria than the ESA allowed, the Oregon district court held the rule arbitrary and capricious.\textsuperscript{414}

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

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

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


\textsuperscript{413} \textit{Alsea,} 161 F. Supp. 2d at 1162.

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


\textsuperscript{416} 2009 Rule, 74 Fed. Reg. at 15,123.

\textsuperscript{417} \textit{See 16 U.S.C. § 1532(6); Alsea,} 161 F. Supp. 2d at 1159.

\textsuperscript{418} 16 U.S.C. § 1532(6).
mean a species' historic range, but upon judicial review of the 2009 Rule, a court need not even reach that decision. Wyoming wolves are non-abundant, genetically isolated, and are federally sheltered from a hostile state government that refuses to provide adequate regulatory protection. Therefore, because Wyoming and the GYA inarguably make up a significant portion of the NRM DPS's range, and Wyoming wolves are in danger of extinction, the ESA, pursuant to its definition of "endangered," could not permit delisting. Second, a prudential argument should be mounted to counter FWS's attempt to circumvent the ESA's proscription of listing decisions below a DPS. FWS charts too slippery a slope. What would be next—delisting decisions that carve out protections for specific counties or zip codes? It appears that upon judicial review, the U.S. District Court for the District of Montana should accord with the Ninth Circuit, and enjoin the 2009 Rule for arbitrarily violating the ESA's prohibition on listing distinctions within a DPS.

**Conclusion**

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

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424 See id.

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

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

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

JESSE H. ALDERMAN