Defenders of Wildlife v. Jewell: Wyoming Wolves Receive a Warranted Reprieve—But for How Long?

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Summary

In September 2014, a federal district court invalidated a U.S. Department of the Interior (DOI) regulation delisting wolves in Wyoming. This Article details the background and history of that litigation, arguing that the court correctly rejected DOI's conclusion that Wyoming had adequately explained how the promised wolf population buffer would be managed, and correctly supported DOI's conclusion that there is sufficient genetic connectivity among wolf populations in the Northern Rocky Mountains. The court was mistaken, however, in upholding DOI's finding that Wyoming areas outside federal lands and the state "trophy game" area do not constitute a significant portion of the wolf's range. *Defenders of Wildlife v. Jewell* and related federal court decisions have generated congressional and executive reactions.

I. Introduction

The reintroduction and recovery of the gray wolf in the Northern Rocky Mountains (NRM) under the Endangered Species Act (ESA)[1] has been controversial.[2] Livestock and hunting industries, western state and local governments, and environmental groups have challenged the U.S. Department of the Interior's (DOI's) implementation of the ESA through the U.S. Fish and Wildlife Service (FWS), which is the agency in DOI responsible for managing endangered and threatened species. Federal courts have been called upon to define the statutory mandates and decide whether DOI complied with the law.

One of the central issues in the NRM wolf litigation has been DOI's approval or rejection of various Wyoming wolf management plans from 2004-2014. These issues were most recently addressed in *Defenders of Wildlife v. Jewell,*[3] which invalidated DOI's regulation delisting Wyoming's gray wolves as an endangered species, and which this Article analyzes in detail. Responding to the court's decision, the U.S. Congress is considering delisting Wyoming's wolves and amending the ESA. The Barack Obama Administration has also proposed delisting the wolf across much of the United States.

II. Background on Wyoming's Wolf Management and DOI's Role

A. *Wolves in Wyoming*

Wyoming has struggled to manage wolves in the state. In 2003, it passed a law that treated wolves, once delisted, as "trophy game" in Yellowstone National Park, Grand Teton National Park, J.D. Rockefeller Parkway, and U.S. Forest Service wilderness areas. A trophy game designation allows state agencies to regulate the method, season, and number of wolves taken. Most of the named area was useless to wolves because of unsuitable habitat, including factors such as high elevation, deep snow, and low ungulate productivity. Under the state law, wolves in other parts of Wyoming would only be considered trophy game if there were fewer than seven packs outside of national parks and fewer than 15 packs in the entire state. Otherwise, wolves outside federal land would be designated as predators and could be taken anywhere without limit by any means without a license. This posed a significant risk to many packs south and east of Yellowstone, which

1. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
2. *See, e.g.*, Edward A. Fitzgerald, *Delisting Wolves in the Northern Rocky Mountains: Congress Cries Wolf*, 41 ELR 10840 (Sept. 2011); *see generally* Edward A. Fitzgerald, Wolves, Courts, and Public Policy: The Children of the Night Return to the Northern Rocky Mountains (2015).
3. No. 12-1833 (ABJ) (D.D.C. Sept. 23, 2014).

leave the park in the winter and could then be subject to unregulated killing as predators.[4]

Wyoming then submitted a wolf management plan to DOI that followed the dictates of the state law. DOI approved plans submitted by Idaho and Montana, but all state plans had to be considered together because they comprised the Western Distinct Population Segment (DPS) for wolves. In 2004, DOI rejected Wyoming's plan, citing as a principal reason the state's designation of the wolf as a predatory animal. DOI stated, "the predatory animal status for wolves must be changed. The unregulated harvest and inadequate monitoring plan, and unit boundaries proposed by the state's management plan do not provide sufficient management controls to assure [FWS] that the wolf population will remain above recovery goals." DOI suggested that "the designation of wolves as 'trophy game' statewide would allow Wyoming to devise a management strategy that provides for self-sustaining populations above recovery goals, regulated harvest and adequate monitoring of that harvest."[5]

In 2005, the state brought suit, alleging that DOI's rejection of its plan violated the ESA and the Administrative Procedure Act (APA)[6] by ignoring the best scientific and commercial data available and instead relying on "litigation risk management" and political concerns. The Wyoming federal district court in *Wyoming v. U.S. Department of the Interior*[7] dismissed the complaint, finding it premature because the state never filed a petition requesting a change in the wolf's status. DOI's rejection of its plan thus was merely advisory rather than final agency action. The U.S. Court of Appeals for the Tenth Circuit affirmed.[8] DOI announced that it was ready to delist the wolves in the NRM once Wyoming's management plan was completed.

Wyoming next petitioned DOI to establish the NRM DPS and delist the wolves in that region.[9] DOI rejected the petition, citing continued problems with the wolf management plan. DOI declared that trophy game status would allow the state to regulate "human-caused mortality throughout unsuitable wolf habitat and provide a remedy for Service concerns about [the state's] authority to manage for wolf numbers and distribution above numerical and distributional recovery levels."[10] Wyoming again brought suit, which was dismissed by the Wyoming federal district court.[11]

In 2006, DOI announced that it was considering establishing a NRM DPS and delisting that wolf population, contingent on the approval of Wyoming's wolf management plan. After the announcement, Idaho's governor, Dirk Kempthorne, became Secretary of the Interior. At his confirmation hearings, Kempthorne complained that implementing the ESA was hampered by litigation. He also promised to resolve the impasse with Wyoming over wolf management.

In 2007, DOI reiterated its intent to create the NRM DPS and delist the wolves there.[12] The state submitted a revised plan that designated wolves as trophy game in a 12,000-square-mile area in northwest Wyoming, including Yellowstone and Grand Teton National Parks. The trophy area constituted 70% of suitable wolf habitat in Wyoming; of that area, 91% was public land. In 2006, this area, excluding national parks, supported 175 wolves in 25 packs with 15 breeding pairs. The wolf was classified as a predator in the remainder of the state, where it could be killed on sight.[13]

Secretary Kempthorne fulfilled his promise to approve Wyoming's wolf management plan.[14] DOI designated and removed the wolves in the NRM DPS from the list of endangered and threatened species in February 2008.[15] The NRM DPS included Idaho, Montana, and Wyoming, eastern Washington, eastern Oregon, and north-central Utah. Only northwest Montana, central Idaho, and the Greater Yellowstone Area (GYA) were known to have wolf packs.

*B. Pre-*Jewell *Litigation*

1. *Defenders of Wildlife v. Hall*

In 2008, following DOI's approval of Wyoming's plan and delisting of the gray wolf in the NRM DPS, environmental plaintiffs brought suit. The Montana federal district court in *Defenders of Wildlife v. Hall* issued a preliminary injunction that restored ESA protections to the wolves in the NRM DPS.[16] The court found no genetic connectivity among the three wolf populations in Idaho, Montana, and Wyoming, an element that DOI declared was essential for the maintenance of a stable wolf population. The court held that DOI's action in approving Wyoming's plan was arbitrary and capricious. The plan suffered from the same defects as the plan DOI had rejected in 2004, when it insisted that Wyoming change the wolf's status as a predator and designate the wolf as trophy game throughout the state.

Wyoming submitted a revised plan in late 2008 that maintained the dual classification of trophy game in northwest Wyoming and predator in the remainder of state, and committed to managing 15 breeding pairs and 150

4. *See* 71 Fed. Reg. 43410, 43427-28 (Aug. 1, 2006).
5. Wyoming v. U.S. Dep't of Interior, 360 F. Supp. 2d 1214, 1223 (D. Wyo. 2005).
6. Administrative Procedure Act (APA), 5 U.S.C. §§500-559, *available in* ELR Stat. Admin. Proc.
7. *Wyoming*, 360 F. Supp. 2d at 1223.
8. Wyoming v. U.S. Dep't of Interior, 442 F.3d 1262, 36 ELR 20067 (10th Cir. 2006).
9. 74 Fed. Reg. 15124 (Apr. 2, 2009).
10. 71 Fed. Reg. 43410, 43431 (Aug. 1, 2006).
11. Wyoming v. U.S. Dep't of Interior, No. 2-06-CV-00245 (D. Wyo. Feb. 27, 2008).
12. U.S. Dep't of Interior (DOI), Proposal to Delist Western Great Lakes and Northern Rocky Mountains (2007).
13. 73 Fed. Reg. 10514, 10549 (Feb. 27, 2008).
14. *See State, Feds Note Wolf Concessions*, Casper Star Trib., May 25, 2007; Ben Neary, *State, Feds Strike Wolf Deal*, Casper Star Trib., May 25, 2007.
15. 73 Fed. Reg. 10514.
16. Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160 (D. Mont. 2008).

wolves. DOI again rejected Wyoming's plan in January 2009, determining that the state's regulatory framework did not guarantee that it would be able to manage its share of the NRM DPS wolf population, and that the current framework limited natural genetic connectivity. Genetic exchange among the three wolf populations in the NRM DPS would be more likely if dispersers have safe passage through the entire state. This would be accomplished by a statewide trophy game designation, which would also help Wyoming to devise more flexible management strategies. Wolf management in Wyoming remained subject to the 1994 experimental population regulations.[17]

2. *Defenders of Wildlife v. Salazar*

After the Obama Administration took office in 2009, DOI, following the earlier proposal by the George W. Bush Administration, delisted the wolves in Idaho and Montana while retaining ESA protections for wolves in Wyoming.[18] The Montana federal district court rejected the delisting proposal in 2010 in *Defenders of Wildlife v. Salazar*.[19] The court held that the NRM DPS could not be subdivided on a state-by-state basis because the ESA defines the units for listing and delisting as species, subspecies, or DPS; the NRM DPS must be treated as a single unit. The court found that the statute's "significant portion of the range"[20] language could not be utilized to change the definition of an endangered or threatened species. Since Wyoming constituted a significant portion of the range of the NRM DPS, wolves in the NRM DPS could not be delisted until Wyoming developed an adequate state management plan.

3. *Wyoming v. DOI*

Wyoming brought suit challenging DOI's rejection of its 2009 wolf management plan. In 2010, the federal district court determined that the department's rejection of Wyoming's plan and insistence on a statewide trophy game designation was arbitrary and capricious. The court, focusing on DOI's acceptance of Wyoming's plan in 2008, held that a statewide trophy designation was not necessary for genetic connectivity because most suitable wolf habitat is in northwest Wyoming. The state's plan did not pose any risk to genetic connectivity and diversity in the near future because Wyoming was committed to meeting its recovery obligations. The court concluded that Wyoming could consider establishing a larger trophy game area, but a statewide trophy designation was not mandated.[21]

Wolf hysteria spread throughout the NRM. Idaho's Republican Governor Butch Otter terminated his state's participation in wolf management. State officials were ordered not to arrest poachers, monitor the state wolf population, or investigate illegal wolf kills or livestock predation.[22] The Idaho Legislature enacted a bill that granted the governor the power to declare a wolf emergency in the state. The emergency could be triggered by potential wolf conflict with humans, livestock, and big game, especially if there were more than 100 wolves in the state. Such an emergency would end when the wolf was delisted statewide or the threat subsided.[23]

Montana's Democratic Governor Brian Schweitzer urged land owners in northern Montana to kill wolves, despite their endangered species classification, if found harassing livestock. Several days later, the governor backtracked,[24] but the spirit of rebellion among Republicans in the Montana Legislature was ignited. The Montana House of Representatives passed a bill "nullifying" the ESA, along with a resolution urging the removal of ESA protections for the wolf.[25]

4. *Alliance for the Wild Rockies v. Salazar*

After settlement efforts failed, Congress intervened. Section 1713, a rider attached to the Department of Defense and Full-Year Continuing Appropriation Act of 2011,[26] resurrected DOI's regulation delisting the wolf in the NRM DPS except Wyoming and precluded its judicial review. DOI was instructed to reconsider Wyoming's plan to determine if a statewide trophy game designation was warranted.[27]

Environmental groups brought suit, alleging that the delisting rider violated the constitutional separation of powers by interfering with pending litigation. The Montana federal district court in *Alliance for the Wild Rockies v. Salazar* found §1713 constitutional, but noted the rider represented "an undermining and disrespect for the fundamental idea of the rule of law."[28] The U.S. Court of Appeals for the Ninth Circuit upheld the lower court's decision on constitutionality because Congress in the rider was not interfering with pending litigation, but instead simply replacing preexisting standards with new standards that a court must follow. The Ninth Circuit also stated "that pre-

17. 74 Fed. Reg. 15123, 15125, 15149, 15172, 15179, & 15182-83 (Apr. 2, 2009).
18. *Id.*
19. 729 F. Supp. 1207 (D. Mont. 2010). *See also* Edward A. Fitzgerald, Defenders of Wildlife v. Salazar: *Delisting the Children of the Night in the Northern Rocky Mountains*, 31 Pub. Land & Resources L. Rev. 1 (2010).
20. 16 U.S.C. §1532.
21. Wyoming v. U.S. Dep't of Interior, Case No. 99-CV-118J (D. Wyo. Nov. 18, 2010).
22. *See* John Miller, *Otter Gives New Orders on Wolves*, Lewiston Morning Trib. (Id.), Oct. 19, 2010.
23. *See* Katherine Wutz, *A Day of Reckoning*, Idaho Mtn. Express, Apr. 8, 2011; Ben Borkin, *Idaho Prepares for Renewed Hunts*, Times-News (Twin Falls), Apr. 16, 2011.
24. *See* Matthew Brown, *Montana Isn't Planning Any Big Wolf Kills*, Lewiston Morning Trib. (Id.), Feb. 19, 2011.
25. *See* Matt Gouras, *Montana Eyes Nullification of the ESA*, Lewiston Morning Trib. (Id.), Feb. 20, 2011; *Governor Schweitzer Statement on Draft EIS*, State News Serv., Mar. 28, 2011.
26. Pub. L. No. 112-10, 125 Stat. 38, tit. VII, §1713, *available at* http://www.gpo.gov/fdsys/pkg/PLAW-112publ10/html/PLAW-112publ10.htm.
27. *See* Eve Byron, *Budget Rider Will Delist Wolves*, Indep. Rec. (Helena, Mont.), Apr. 5, 2011. President Obama signed the appropriation bill delisting the wolves on April 15, 2011. 76 Fed. Reg. 25590 (May 5, 2011).
28. Alliance for the Wild Rockies v. Salazar, 800 F. Supp. 2d 1123, 41 ELR 20252 (D. Mont. 2011).

clusion of judicial review indicates Congressional intent to change the law applicable to the project."[29]

5. Wyoming Settlement Agreement

Section 1713 instructed DOI to reconsider Wyoming's management plan. The Obama Administration decided not to appeal and instead negotiated an agreement, in which Wyoming promises to manage 100 wolves and 10 breeding pairs outside Yellowstone National Park. A flexible management area 50 miles south of the park in Sublette and Lincoln Counties and one-half of Teton County is established where wolves have trophy game status from October 15 through March 1. This allows wolves in Wyoming to connect with other NRM wolves. Wolves are treated as predators in the remainder of the state, where they can be shot on sight.[30]

After the Wyoming Legislature amended the state plan to meet federal approval, DOI delisted the Wyoming wolves on August 31, 2012.[31] Wyoming assumed responsibility for wolf management. Environmental groups filed suit challenging the delisting of the Wyoming wolves,[32] as discussed below. At the end of 2014, there were 333 wolves in 44 packs with 25 breeding pairs in Wyoming.[33]

III. *Defenders of Wildlife v. Jewell*

In September 2014, the U.S. District Court for the District of Columbia in *Defenders of Wildlife v. Jewell* invalidated DOI's regulation delisting Wyoming's wolves. The court held that Wyoming's promise to establish a buffer (a population of wolves above recovery goals to ensure the achievement of recovery levels) was not legally enforceable; therefore, DOI could not rely on Wyoming's promise to satisfy the ESA requirement for an adequate regulatory mechanism. The federal court did, however, uphold the department's conclusions that there was adequate genetic connectivity in the NRM DPS, and that the remainder of Wyoming outside public lands and the state trophy game area did not constitute a significant portion of the wolf's range.[34] This section argues that the federal court's decision regarding the buffer zone and genetic connectivity was correct, but mistaken regarding the significant portion of the range.

A. *Buffer Zone*

1. Statutory Interpretation and Case Law

DOI established the recovery goal for Idaho and Montana as 150 wolves and 15 breeding pairs. Wyoming was only required to manage 100 wolves and 10 breeding pairs because most of the wolves in Wyoming reside on federal lands outside of state jurisdiction. DOI asserted that wolves on public land would partially serve as a buffer to ensure that Wyoming achieved its recovery goals. The Yellowstone National Park wolf population fluctuated, but was expected to stabilize at 50-100 wolves and 4-6 breeding pairs. Nevertheless, DOI insisted that Wyoming needed to manage a buffer population above its required 100 wolves and 10 breeding pairs to meet its recovery goals. DOI declared that "Wyoming will, and must, maintain a buffer to consistently meet its minimum management targets."[35]

DOI argued that the court should accord *Chevron*[36] deference to its decision that the importance of the buffer in Wyoming's plan, coupled with the state's promise to maintain the buffer through adaptive management, was sufficient. Although DOI was required to consider legally enforceable policies, it could also recognize nonbinding policies. DOI maintained that it could not ignore Wyoming's statutes, implementing regulations, or management plan because doing so would violate the department's obligation "to rely upon the best science and commercial information available and to take into account State conservation efforts." Further, DOI contended, the ESA was not intended to preempt state programs.[37]

The court properly rejected DOI's contentions, which were inconsistent with the statutory text, legislative intent, and case law. The court was not required to afford *Chevron* deference on this issue because there was no statutory ambiguity. Statutory interpretation begins with the text, which has been enacted into law through the constitutionally prescribed process.[38] Section 4 of the ESA requires the Secretary of the Interior to consider the adequacy of existing regulatory mechanisms.[39] The common usage definition of "regulate" is "control or direct according to a rule, principle."[40] A regulatory mechanism that is not binding does not control or direct; instead, a regulatory mechanism must have the force of law.

29. Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170, 1174-75, 42 ELR 20057 (9th Cir. 2012). For a full analysis, see Edward A. Fitzgerald, Alliance for the Wild Rockies v. Salazar: *Congress Behaving Badly*, 25 Vill. Envtl. L.J. 351 (2014).
30. *See Secretary Salazar Agrees to Weak Wyoming Wolf Plan*, State News Serv., July 7, 2011; Mead Gruver, *Wyoming Officials Say Near Deal*, Lewiston Morning Trib., July 30, 2011; Ben Neary, *Wyoming, Feds Announce Plans to Delist*, Assoc. Press, Aug. 4, 2011.
31. 77 Fed. Reg. 55530 (Sept. 10, 2012).
32. Defenders of Wildlife v. Jewell, Civ. Action No. 12-1833 (ABJ) (D.D.C. Sept. 23, 2014). *See also* Ben Neary, *Groups Intend to Sue Feds Over Wyoming Delisting*, Lewiston Morning Trib. (Id.), Sept. 11, 2012; Ben Neary, *Groups Join Wyoming in Opposing End to Wolf Suit*, Assoc. Press, May 23, 2013.
33. U.S. Fish & Wildlife Serv. (FWS), Northern Rocky Mountain Wolves Recovery Program 2014 Interagency Annual Report 1-2.
34. *Defenders of Wildlife*, Civ. Action No. 12-1833.
35. *Id.* at 15-27, *citing* 77 Fed. Reg. at 55556. Wyoming intervened, alleging that it was only legally required to manage 10 breeding pairs and 100 wolves. *Id.* at 20.
36. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
37. Federal Defs.' Mem. in Opp'n to Pls Mot. for Summ. J. at 3-16, Defenders of Wildlife v. Jewell, Civ. Action No. 12-1833 (ABJ) (D.D.C. Sept. 23, 2014) [hereinafter Federal Defs.' Mem.].
38. Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 Wash. U. L.Q. 351, 355-63 (1994).
39. 16 U.S.C. §1533.
40. Webster's New World Dictionary 593 (1978).

If a court determines that the statute is ambiguous, it proceeds to examine the legislative intent.[41] Here, the legislative history indicates that the ESA was not designed to "preempt efficient [state] programs" as DOI alleged, but the ESA does preempt state programs when state policies are insufficient. The U.S. Senate Commerce Committee Report states that "the federal government should protect such species where states have failed to meet minimum Federal standards."[42]

The *Jewell* court noted that federal courts have consistently held that "the FWS cannot rely on promised and unenforceable conservation agreements in evaluating existing regulatory mechanisms."[43] For example, environmental groups brought suit challenging the National Marine Fisheries Service (NMFS) refusal to list the Oregon silver salmon as an endangered species. NMFS asserted that future provisions would protect the salmon. In 1998, the Oregon federal district court held in *Oregon Natural Resources Council v. Daley* that the ESA unambiguously states that the federal government must rely on existing regulatory standards; therefore, NMFS could not rely on future efforts.[44]

Federal courts have allowed FWS to consider nonenforceable policies that supplement ESA requirements, but only if they have previously been implemented and proved effective. For example, in 2012, the U.S. District Court for the District of Columbia in *Colorado River Cutthroat Trout v. Salazar*[45] upheld the FWS decision not to list the Colorado cutthroat trout as an endangered or threatened species. FWS acknowledged that voluntary agreements "do not qualify as a regulatory mechanism" and that its findings could not be based on a "promised or anticipated result of conservation actions." The court noted that the environmental plaintiffs accused FWS of relying on the conservation strategy,[46] but did not show that the decision was based solely on the conservation strategy. The court noted that "while the FWS can't rely on promised or unenforceable conservation agreements in evaluating existing regulatory mechanisms," nonetheless "its consideration of the Conservation Strategy as part of its overall assessment of ongoing management practices is not inappropriate."[47]

2. Peer Review

The *Jewell* court's decision was supported by several of the peer reviewers of Wyoming's plan. The ESA requires DOI to utilize the best available science to make listing and delisting decisions under the statute.[48] DOI relies on a two-step process when assessing the adequacy of existing regulatory mechanisms. The proposal is first reviewed by FWS internal staff; then, if approved, the proposal is sent out for peer review.[49]

DOI proposed the Wyoming delisting in October 2011. The first peer review of the plan, which was performed before Wyoming changed its statutes and enacted implementing regulations, was completed in December 2011. It concluded that the establishment and maintenance of the buffer was not adequately explained in Wyoming's plan. DOI could not rely on Wyoming's verbal promise to maintain a buffer; Wyoming must show how the recovery goals would be maintained. Wyoming did not have to articulate specific numbers for the buffer, but must show how its monitoring would be integrated into wolf management to ensure recovery. One reviewer, Dr. John Vucetich, a wildlife ecologist from Michigan Technological University, was particularly concerned that Wyoming's commitment to reduce its wolf population without the explicit guarantee of a buffer could pose a risk to recovery.[50]

After the first peer review, Wyoming produced an addendum to its plan to address concerns raised by the peer reviewers. The addendum declared that Wyoming will manage a buffer population above the 10 breeding pairs and 100 wolves outside Yellowstone National Park and Wind River Reservation to ensure that recovery goals are met. Wyoming will not manage the wolf population at a minimum level. The buffer will only apply to the trophy game area, not to national parks. The size of the buffer is not specified, but will be determined by adaptive management and will fluctuate depending on the population. If the population approaches minimum levels, the state will limit wolf control efforts. Wyoming, however, is committed to reducing its wolf population over several years.[51]

The second peer review was completed in May 2012. Several of the peer reviewers still found Wyoming's promise to manage a buffer population inadequate.[52] Dr.

41. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 Tul. L. Rev. 803, 813-15 (1994); William N. Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621, 643-50 (1990).
42. S. Rep. No. 93-307 (July 1, 1973), *reprinted in* A Legislative History of the ESA of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980, at 302 [hereinafter Legislative History].
43. Defenders of Wildlife v. Jewell, Civ. Action No. 12-1833 (ABJ), slip op. at 27 (D.D.C. Sept. 23, 2014), *citing* Defenders of Wildlife v. Kempthorne, 538 F. Supp. 2d 121, 130-31 (D.D.C. 2008); Biodiversity Legal Found. v. Babbitt, 943 F. Supp. 23, 26, 27 ELR 20462 (D.D.C. 1996); In re Polar Bear ESA Listing and Section 4(d) Rule Litig., 794 F. Supp. 2d 65, 112, 41 ELR 20220 (D.D.C. 2011); CBD v. Morgenweck, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004); and Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015, 1030-31, 41 ELR 20347 (9th Cir. 2011).
44. Oregon Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1153-55, 29 ELR 20514 (D. Or. 1998), *citing Biodiversity Legal Found.*, 943 F. Supp. at 26, and Southwest Ctr. for Biodiversity v. Babbitt, 939 F. Supp. 49 (D.D.C. 1996).
45. 898 F. Supp. 2d 191 (D.D.C. 2012).
46. FWS' Conservation Agreement and Strategy for the Colorado River Cutthroat Trout "operates to eliminate and reduce '[t]hreats that warrant [trout] listing as a special status species by state and federal agencies and might lead to listing under the ESA.'" *Id.* at 207-08.
47. *Cutthroat Trout*, 898 F. Supp. 2d at 207-08. *See also* Tucson Herpetological Soc'y v. Salazar, 898 F. Supp. 2d 191 (D.D.C. 2012).
48. 16 U.S.C. §1533(b)(1)(A).
49. 59 Fed. Reg. 34270 (July 1, 1994).
50. U.S. FWS, Final Wyoming Gray Wolf Peer Review Panel Summary Report (2011) [hereinafter First Peer Review].
51. Wyoming Game & Fish Comm'n, Addendum: Wyoming Gray Wolf Management Plan (2012) [hereinafter Addendum].
52. U.S. FWS, Final Peer Review of Four Documents Amending and Clarifying the Wyoming Wolf Management Plan (2012) [hereinafter Final Peer Review]. Three of the five peer reviewers, Dr. Layne Adams, USGS Alaska Science Center, Dr. David Mech, USGS Northern Prairie Wildlife Center, Dr. Scott Mills, University of Montana, Daniel Stark, Min-

Scott Mills, an ecologist with the University of Montana, asserted that the buffer is essential to maintain the recovered population. Wyoming's statutes and regulations only commit the state to managing 10 breeding pairs and 100 wolves in the trophy game area. The peer reviewer recommended that Wyoming be more explicit about the buffer, such as establishing quantitative thresholds or a specific operational protocol to determine the buffer, and opined that the present plan does not show how Wyoming will achieve or manage the buffer population.[53]

Dr. Vucetich pointed out that issues such as the size of the buffer, why such a size is necessary, and how adaptive management will serve the buffer, remain unknown. The size of the buffer must be specified in order for DOI to determine whether Wyoming's management approach is effective; whether the planned harvest is consistent with the recovery goals; and whether the plan is focused only on present, not future, management. The peer reviewer noted that Wyoming's plan lacks details regarding specifics. A plan to develop a plan is not a plan. The state's recalcitrance suggests that the buffer will be inadequate.[54]

B. Genetic Connectivity

DOI asserted that there was sufficient genetic diversity and no threat of inbreeding. The GYA wolf population is not isolated. Dispersal data shows that five radio-collared wolves migrated into the GYA from 1992-2008 and that two bred. Since only 20-30% of the wolf population was tracked, DOI assumed that three times as many wolves dispersed into the GYA. On average, 35% of the dispersers reproduced per generation (four years). This indicated there had been 1.0 to 1.5 effective migrations since reintroduction. The acceptable scientific standard to prevent genetic problems is one migration per generation.

Genetic data from 1995-2004 also indicated that there had been a minimum of 3.3 to 5.4 effective migrations per generation among the three NRM subpopulations. Within this range, 3.3 effective migrations per generation were the result of natural dispersal, while 5.4 reflected human-assisted migration. Natural dispersal data within the GYA showed that six wolves in four packs appear to have descended from one Idaho male disperser. The data demonstrated 0.42 natural effective migrations entering the GYA per generation during the 10-year study period. As only 30% of the NRM population was studied, it was reasonable to assume that the minimum effective migration was underestimated.[55]

The federal court found that DOI's determination regarding genetic connectivity was reasonable. The court relied on the department's data and methodology, but noted there was dispute about the methodology employed to determine the effective migrations, specifically DOI's extrapolations to account for the small sample size. Nevertheless, given the scientific uncertainty, the court deferred to DOI's expertise.[56] The court was correct in upholding the department's finding because it was consistent with the best available science and the findings of the peer reviewers.

1. Best Available Science

The best available science demonstrated there was sufficient genetic connectivity among the three NRM wolf populations. DOI relied on a 2010 study by Bridgett vonHoldt that analyzed the DNA samples from 555 wolves in the three NRM recovery areas, including all 66 reintroduced founders, for variations in 26 microsatellite loci over the initial 10-year recovery period from 1994-2004. The study found an average of 3.3 to 5.4 migrations per generation, which was sufficient to avoid any genetic problems. Since only 30% of the NRM population had been examined, the true number of migrations and level of gene flow was probably greater than conditions through 2004 when the NRM population was approximately one-half the current population. The study cautioned, however, that successful conservation will depend on management decisions that promote natural dispersal and minimize factors that reduce genetic connectivity, such as hunting and predator control. The study warned that a sufficient size population and adequate dispersal corridors must be maintained to ensure connectivity.[57]

2. Peer Review

The court's decision was also consistent with the findings of the peer reviewers. The first peer review in 2011 acknowledged some difference in opinions, but concluded that the genetic flow among the three NRM populations was adequate in the short and medium term. Monitoring by Wyoming would address any genetic concerns. Demographic factors were more important than genetic factors.[58]

Wyoming's addendum to its management plan declared that the state was committed to managing its wolf population to ensure genetic diversity and connectivity. Wyoming promised to encourage migration into the state, monitor its population to avoid genetic problems, and strive to achieve one migration per generation. If any genetic problems appeared, Wyoming will reduce mortality in the dispersal corridors and mortality quotas over a series of years to increase migration. Human translocation will only occur as

nesota Department of Natural Resources, and Dr. John Vucetich, Michigan Technological University, did not find fault with the plan with respect to this issue.

53. Final Peer Review, *supra* note 52, at 63-67.
54. *Id.* at 70-76.
55. Federal Defs.' Mem., *supra* note 37, at 33-39, *citing* 77 Fed. Reg. 55593-94.
56. Defenders of Wildlife v. Jewell, Civ. Action No. 12-1833 (ABJ) (D.D.C. Sept. 23, 2014), slip op. at 27-32. *See also* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377, 19 ELR 20749 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 412, 6 ELR 20532 (1976).
57. Bridgett M. VonHoldt et al., *A Novel Assessment of Population Structure and Gene Flow in the Grey Wolf Populations of the Northern Rocky Mountains of the United States*, 19 Molecular Biology 4412 (2010). *See also* Mark Hebblewhite et al., *Restoration of Genetic Connectivity Among Northern Rockies Wolf Populations*, 19 Molecular Biology 4383 (2010).
58. First Peer Review, *supra* note 50, at 15.

a last resort. Finally, the addendum states that Wyoming will coordinate its efforts with Idaho and Montana.[59]

The second peer review reiterated the earlier conclusion that the Wyoming plan did not pose any genetic problems.[60] Dr. Vucetich, however, remained critical. He asserted that Wyoming's promise to ensure genetic connectivity through monitoring and/or the reduction in mortality quotas provides the state with too much discretion. There is no empirical measure on when human-caused mortality would be decreased to ensure genetic connectivity. Wyoming must be concerned with both immigration and emigration to ensure genetic connectivity. Human translocation should be avoided in all cases.[61]

C. Significant Portion of Range

DOI defined the significant portion of the range as that part of the current range that is necessary for the species survival. The federal lands in northwest Wyoming and the state trophy game area are the only significant portions of the wolf's range in Wyoming. The permanent trophy game area of 15,000 square miles contains most of the state's suitable wolf habitat, including 100% of Wyoming's Yellowstone, 81% of the suitable habitat in the state, 88% of breeding pairs, 83% of the packs, and 86% of the wolves (2011 population numbers). The remainder of Wyoming—the predator zone—contains poor quality habitat and a few wolf packs that are not essential for the species survival. Furthermore, DOI characterized its earlier insistence on a statewide trophy game designation as simply the means to ensure the achievement of recovery goals. The changes in Wyoming's current plan satisfied DOI's prior objections.[62] The federal court accepted the Department's definition of the significant portion of the range and found its determination reasonable.[63] The court was mistaken on both findings.

1. Legal Meaning of "Significant Portion of Its Range"

The definition of "significant portion of its range" is a legal question that requires a court to utilize the two-step *Chevron* framework. First, the court must determine "whether Congress has directly spoken to the precise question at issue."[64] Federal courts utilize the traditional tools of statutory construction—text, intent, and purpose—to determine if there is congressional direction.[65]

The court's inquiry begins with the text. The term "significant portion of its range" is ambiguous. The Ninth Circuit addressed this in *Defenders of Wildlife v. Norton*, regarding DOI's refusal to list the flat-tailed horned lizard as an endangered species. DOI determined that suitable habitat on public land ensured the lizard's viability, despite threats to the species on private land. The environmental plaintiffs argued that the lizard's private land habitat constituted a significant portion of its range where its survival might be in jeopardy. The Ninth Circuit determined that the statutory language was "inherently ambiguous."[66]

The Ninth Circuit rejected the Secretary's interpretation that a species was only entitled to ESA protection if it "faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be within the foreseeable future" because it rendered the "significant portion of its range language" superfluous. The court concluded that a species could be extinct "throughout a significant portion of its range if there are major geographic areas in which it is no longer viable but once was."[67] The court indicated that a species can have a different status in different portions of its range.

If the text does not answer the interpretative question, a court must examine the legislative history to discover the legislative intent. The two statutes preceding the ESA described endangered species as those facing complete extinction.[68] The ESA of 1973 expanded the definition of endangered species to those facing "extinction throughout all or a significant portion of its range . . . ." The U.S. House of Representatives Merchant Marine and Fisheries Committee stated that this major change represented "a significant shift in the definition in existing law which considers a species to be endangered only when it is threatened with worldwide extinction."[69] The new language was added to encourage greater federal-state cooperation and grant the Secretary greater flexibility regarding wildlife management.[70]

DOI recognized that the ESA permits different populations of the same species to have different status in different parts of its range. For example, grizzly bears were listed as threatened species within the 48 contiguous states, but not in Alaska. Only the California, Oregon, and Washington populations of the marbled murrelet, whose range in North America extends from the Aleutian Archipelago in Alaska to central California, were listed as threatened. The desert bighorn sheep was only listed as an endangered species in peninsular ranges of southern California, although its range extends into Baja California. Only the population of Steller sea lions occurring west of 144 degrees West longitude were listed as endangered species, while the remaining population was listed as threatened. Only the Florida population of the Audubon crested caracara, a hawk that occurs from Florida, southern Texas and Arizona, and northern Baja California south to Panama, was listed as a threatened species. The piping plovers in the watershed of the Great Lakes

59. Addendum, *supra* note 51, at 6-7.
60. Final Peer Review, *supra* note 52, at 2-6.
61. *Id.* at 70-76.
62. Federal Defs.' Mem., *supra* note 37, at 40-44.
63. Defenders of Wildlife v. Jewell, Civ. Action No. 12-1833 (ABJ), slip op. at 32-39 (D.D.C. Sept. 23, 2014).
64. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-45, 14 ELR 20507 (1984).
65. INS v. Cardoza-Fonseca, 480 U.S. 421, 446-49 (1987).
66. Defenders of Wildlife v. Norton, 258 F.3d 1136, 1141, 31 ELR 20846 (9th Cir. 2001).
67. *Id.* at 1141-42.
68. *Id.* at 1144.
69. *Id.*, *citing* H.R. Rep. No. 93-412 (1973).
70. *Id.* at 1144. *See also* Legislative History, *supra* note 32, at 359-60.

were listed as endangered species, but were only a threatened species throughout the remainder of their range.[71]

There was an attempt to change the statutory text in 1978. A proposed amendment changed "the significant portion of its range" to "the essential portion of its range." "Essential" was defined as "that portion of the range necessary for the continued survival and recovery of the species."[72] The amendment was passed by the Senate, but rejected by the conference committee.[73] The failure of Congress to adopt this amendment represents an explicit rejection of DOI's definition of "significant portion of its range."[74] There also was language in the 1978 House Merchant Marine and Fisheries Committee Report indicating that the term "range" refers to the "historical range" of the species. The committee stated that "the term 'range' is used in the general sense, and refers to the historical range of the species."[75]

Further guidance and clarification of statutory meaning are found in the statutory purposes. While more abstract in nature than the legislative intent, statutory purposes provide the overall statutory goals.[76] The ESA is concerned with the protection, conservation, and restoration of endangered and threatened species and the ecosystems on which they depend.[77] Congress was particularly concerned with the protection of ecosystems, finding that "the two major causes of extinction are hunting and destruction of natural habitat." The most crucial was the destruction of natural habitat.[78]

The ESA Amendments of 1982 stressed the importance of ecosystem conservation. The conference committee noted that "individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element." The conference committee declared that "the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species."[79]

The ESA is also concerned with the preservation of biodiversity, which is "a living, exploitable, renewable resource" with "economic importance and potential consumptive and transformative uses."[80] The ESA recognizes that "species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[81] The legislative history is replete with references regarding the necessity of protecting biodiversity. The 1973 House Merchant Marine and Fisheries Committee stated: "As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage." The committee noted: "The value of this genetic heritage is, quite literally, incalculable. . . . They are keys to puzzles which we cannot solve, and may provide the answers to questions which we have not yet learned to ask."[82] Numerous courts have also recognized the economic importance of biodiversity.[83]

The wolf plays an important role in ecosystem maintenance and protection of biodiversity. Ecosystem maintenance requires biodiversity, which is based on a diverse gene pool.[84] The degree of complexity necessary for healthy maintenance is unknown. Predators such as the wolf play an important role by balancing the ecosystem through top-down trophic cascade. The wolf provides sustenance for the entire food chain. After wolves make a kill, other scavengers take their share, insects clean the carcass, and birds feed on the insects. Wolves also maintain the balance among predators by limiting the coyote population, which grows in their absence. This limiting action replenishes the coyote's prey (mainly rodents) for predatory birds such as hawks, eagles, and owls. Reduction in the coyote population also helps the fox, which coexists with the wolf.[85] The wolf keeps its prey in check, affects prey behavior, and increases the supply and diversity of plant life. The trophic cascade varies across ecosystems because of food web complexity, diversity, productivity, and other factors.[86]

2. Case Law

DOI's definition of "significant portion of its range" is contrary to case law. Most federal courts have rejected the Department's definition that the key factor determining the significant portion of the range is its relevance to the survival of the taxon. Most federal courts have required that DOI explain why the historical range of the species is not a significant portion of the range.[87]

71. *Norton*, 258 F.3d at 1145.
72. Legislative History, *supra* note 42, at 1126-30.
73. H.R. Rep. No. 95-1804 (1978) (Conf. Rep.), *cited in* Legislative History, *supra* note 42, at 1192.
74. INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987). *See also* William N. Eskridge, *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 84-89 (1988).
75. Legislative History, *supra* note 42, at 742.
76. Henry M. Hart & Albert M. Sacks, The Legal Process 1124, 1374-80 (1994); Vincent Wellman, Dworkin *and the Legal Process Tradition*, 29 Ariz. L. Rev. 413, 463 (1987).
77. 16 U.S.C. §1531(b), (c).
78. S. Rep. No. 93-307, at 2 (1973). *See also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 179, 8 ELR 20513 (1978).
79. H.R. Rep. No. 97-835, at 30 (1982) (Conf. Rep.).
80. Mark A. Urbanski, *Chemical Prospecting, Biodiversity Conservation, and the Importance of International Protection of Intellectual Property Rights in Biological Materials*, 2 Buff. J. Int'l L. 131, 134-35 (1995).
81. 16 U.S.C. §1531.
82. H.R. Rep. No. 93-412 (1973), *cited in* Legislative History, *supra* note 42, at 143-44.
83. *See, e.g.*, Gibbs v. Babbitt, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000); United States v. Bramble, 103 F.3d 1475, 1480-82 (9th Cir. 1996); National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1057-60, 28 ELR 20403 (D.C. Cir. 1997).
84. Patrick Parenteau, *Rearranging the Deck Chairs: ESA Reforms in an Era of Mass Extinctions*, 22 Wm & Mary Envtl. L. & Pol'y Rev. 227, 238-41 (1998).
85. Craig R. Enochs, *Gone Today, Here Tomorrow: Policies and Issues Surrounding Wildlife Reintroduction*, 4 Hastings W.-Nw. J. Envtl. L. & Pol'y 91, 99 (1997).
86. Mark Hebblewhite et al., *Human Activity Mediates A Trophic Cascade Caused by Wolves*, 86 Ecology 2135 (2005). *See also* John Terborgh et al., *The Role of Top Carnivores in Regulating Terrestrial Ecosystems* 39-65, *in* Michael E. Soule & John Terborgh, Continental Conservation: Scientific Foundation of Regional Reserve Networks (1999).
87. *See, e.g.*, Defenders of Wildlife v. Norton, 258 F.3d 1136, 1141, 1145, 31 ELR 20846 (9th Cir. 2001); Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9, 14-17 (D.D.C. 2002); Southwest Ctr. for Biological Diversity v. Norton, Civ. Act. No. 98-934 (RMU/JMF) (D.D.C. 2002); Environmental

For example, in 2007, the Arizona federal district court in *Tucson Herpetological Society v. Salazar*[88] determined that the Secretary can list the flat-tailed lizard if it is endangered in a significant portion of its range, even if it is not threatened in its current range. The Secretary must consider the historic range of the lizard and explain why the loss of historic range is insignificant. On appeal, the Ninth Circuit reaffirmed its earlier decision in *Defenders of Wildlife v. Norton* that the Secretary must explain why unoccupied areas of the lizard's historic range are insignificant, but found that the Secretary fulfilled this requirement. The Secretary quantified the lizard's range 100 years ago and identified the habitat loss from this baseline. The Secretary concluded the lost historic range was insignificant because the lizard persists in its current range despite habitat loss and fragmentation. Most of its historic habitat had been converted to agricultural, commercial, and residential use. The lost portion did not contain any biological or genetic diversity and only represented a small portion of the historic baseline.[89]

3. DOI's Mistaken Reliance on *Brand X*

DOI asserted that it did not have to follow the Ninth Circuit decision in *Defenders of Wildlife v. Norton* because the U.S. Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services (Brand X)*[90] held that a federal court must defer to an agency's interpretation of an ambiguous statute as long as the interpretation is reasonable. Prior judicial interpretation of the statute only trumps the current agency interpretation if the judicial decision was based on the unambiguous terms of the statute, which leaves no room for agency discretion. If there are competing interpretations of the statute, the agency interpretation should prevail.[91]

DOI's reliance on *Brand X* was mistaken for several reasons. First, the Court in *Brand X* was rectifying a problem it created in *United States v. Mead*,[92] which held that federal courts do not have to grant *Chevron* deference to an agency's interpretative rules because such rules are not specifically authorized by Congress. Federal courts only have to grant *Chevron* deference to agency actions done pursuant to congressionally delegated authority, specifically through notice and comment or adjudication. The Court closed this loophole in *Brand X* and required federal courts to defer to all reasonable agency decisions including interpretative rules.[93]

Second, DOI's interpretation of *Brand X* raises constitutional problems with the separation of powers. The Department's interpretation allows federal agencies, which are part of the executive branch, to reverse decisions of the federal judiciary, violating the principle that federal courts are the final interpreters of law.[94] It also undermines the role of Congress. If Congress disagrees with a court's statutory interpretation, Congress can change the statute. Failure to act can be viewed as congressional acquiescence to the judicial interpretation.[95]

Third, DOI's interpretation minimizes the federal court's role regarding statutory interpretation and subverts the nondelegation doctrine. Congress enacts statutes that grant broad implementing authority to federal agencies. Broad authority is delegated because Congress expects the courts to ensure that executive agency decisions conform to the statutory mandates, which reflect the original bargain of the enacting legislative coalition.[96] Further, diminishing the supervisory role of the judiciary only aggravates the problem of agency capture: As one commenter noted, "foxes should not guard henhouses."[97]

Fourth, DOI's interpretation sabotages the principle of stare decisis, which provides coherence, consistency, equity, fairness, predictability, rationality, and stability to the law.[98]

IV. DOI's Acceptance of Wyoming's Plan Was Not Reasonable

If Congress has not addressed the issue, a court cannot simply impose its own construction on the statute. The court must move to the second step of the *Chevron* analysis and determine "whether the agency's answer is based on a permissible construction of the statute."[99] The second step has been equated with "hard look review,"[100] which requires the court to examine the agency action "to satisfy itself that the agency has exercised a reasoned discre-

Prot. Info. Ctr. v. National Marine Fisheries Serv., No. C-02-5401 EDL (D.D.C. 2004), slip op. at 13; Defenders of Wildlife v. U.S. DOI, 354 F. Supp. 2d 1156, 35 ELR 20033 (D. Or. 2005). Two federal district courts in the Tenth Circuit have accepted the FWS definition. *See* Center for Biodiversity v. Norton, 411 F. Supp. 2d 1271 (D.N.M. 2005); Center for Biodiversity v. FWS, 2007 U.S. Dist. LEXIS 16175 (D. Colo. 2007).

88. 2007 U.S. Dist. LEXIS 50740; 66 Env't Rep. Cases (BNA) 1080 (D. Ariz. 2007).
89. Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870 (9th Cir. 2009).
90. 545 U.S. 967 (2005).
91. Federal Defs.' Mem., *supra* note 37, at 41 n.28.
92. 533 U.S. 218 (2001).
93. *Brand X*, 545 U.S. at 1001-06 (Stevens & Breyer, JJ., concurring) and 1014-19 (Scalia, J., dissenting). *See also* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1275 (2002); Doug Geyser, *Courts Still "Say What the Law Is"; Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 Colum. L. Rev. 2129 (2006).
94. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also* 5 U.S.C. §706; Maislin Indus. U.S. v. Primary Steel, 497 U.S. 116, 130-34 (1990); Lechmere v. National Labor Relations Bd., 502 U.S. 527, 536-37 (1992); Neal v. United States, 516 U.S. 284, 295 (1996).
95. Johnson v. Santa Clara Transp. Agency, 480 U.S. 616, 629 n.7 (1987). *See also* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).
96. Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 478-88 (1989); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & Econ. 875 (1975).
97. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 466-69 (1987).
98. Richard J. Pierce Jr., *Reconciling* Chevron *and Stare Decisis*, 85 Geo. L.J. 2225, 2237-48 (1997); Rebecca Hanner White, *The Stare Decisis Exception to the* Chevron *Deference Rule*, 44 Fla. L. Rev. 723 (1992); Jonathan Masur, *Judicial Deference and Credibility of Agency Commitments*, 60 Vand. L. Rev. 1021 (2007).
99. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45, 14 ELR 20507 (1984).
100. Jonaathan T. Molot, *Judicial Perspective in the Administrative State*, 53 Stan. L. Rev. 1, 92-99 (2000).

tion, with reasons that do not deviate from or ignore the ascertainable legislative intent."[101] History demonstrates that DOI considered the remainder of Wyoming to be a significant portion of the wolf's range. DOI insisted that Wyoming establish a statewide trophy game designation for the wolves until the recent agreement. DOI is allowed to change its position, but must explain the reason for the changes.[102] DOI's explanation was not reasonable.

In early 2008, DOI designated and removed the gray wolf from the list of endangered and threatened species in the NRM DPS. Later that year, Wyoming submitted a revised plan that maintained the dual classification of trophy game in northwest Wyoming and predator in the remainder of the state. In 2009, DOI rejected the plan, determining that Wyoming's regulatory framework did not guarantee that the state would be able to manage its share of the wolf population in the NRM DPS. DOI insisted on a statewide trophy game designation.

In 2010, the Wyoming federal district court held in *Wyoming v. Department of Interior* that DOI's insistence on a statewide trophy game designation was arbitrary and capricious. The court found the elements in Wyoming's plan that maintained the dual classification did not pose any risk to genetic connectivity and diversity in the near future. The court was confident that Wyoming would not reduce the trophy game area to keep its wolf population at a minimum because the state was committed to meeting its recovery obligations. The court conceded that state predator control was more stringent than the existing federal regulation, but its impact must be analyzed in terms of a larger trophy game area, not statewide.[103] The court focused solely on DOI's acceptance of Wyoming's plan in 2008, but ignored the Department's prior and subsequent rejections that mandated the establishment of a statewide trophy game designation.

DOI's acceptance of the state plan in 2008 was the aberration. In the wake of the Montana federal district court decision in *Defenders of Wildlife v. Hall*, DOI had reaffirmed its long-held position, stating:

> We were probably too optimistic about what the law really committed Wyoming to and what could be accomplished by regulations alone. We also should have evaluated the potential for genetic connectivity more closely. . . . The very specific and deliberate intent, tone, and working of Wyoming law clearly continues to be the major impediment to Wyoming developing and implementing a wolf management plan the Service can approve. In the past Wyoming has . . . almost without exception encouraged wolf take to drive the wolf population down to minimum recovery levels. We believe that the best way for Wyoming to provide adequate regulatory mechanisms would be to develop a statewide trophy game management designation as the basis for any revised regulatory framework.[104]

The Wyoming federal district court questioned the need for the statewide trophy game designation that DOI insisted was necessary for dispersal and connectivity. According to DOI, Wyoming's plan only protected the wolf in 12% of the state. Wolves dispersing into and leaving the trophy area could be killed in the surrounding predator control area. Dispersing from Idaho and Montana requires access to the GYA. Physical barriers, such as mountains and high elevation, discourage dispersal from the north and west. Dispersing wolves have greater access to the GYA from the east and south. Limited social opportunities in Yellowstone would cause some dispersers to avoid the park. Wolves travelling to the GYA would have to traverse across Wyoming, where they faced death in predator control areas.[105]

Furthermore, wolves in Wyoming leave the trophy game area to seek food and establish new territory. Wyoming maintained 22 winter elk feeding stations, 12 of which were in predator control areas. These areas attract wolves. History indicated that wolves leaving the trophy game area would be terminated in predator control areas. DOI noted that after the 2008 delisting, most of the wolves in the predator control area (17 of the 28) were killed within a few weeks.[106]

DOI asserted that the statewide trophy game designation would allow Wyoming "to regulate the methods of taking, hunting season, types of allowed takings, and number of wolves killed."[107] Idaho and Montana managed wolves as trophy game. A statewide trophy game status would allow Wyoming to devise a more flexible management strategy that would provide for a self-sustaining population above recovery levels; preclude a patchwork of different management strategies; facilitate predator management; and be consistent with the current federal regulatory scheme. Furthermore, statewide trophy game status would assist law enforcement efforts that will be difficult if the wolf has different status in different parts of the state.

The current Wyoming plan suffers from the same defects that DOI pointed out in the 2010 case. Wolves are only protected in 15% of the state and still can be killed in the trophy game area. Limiting wolves to northwest Wyoming will affect genetic connectivity. Dispersers will be put at risk. Wolf recovery in other states in the wolf's historic range will be also be jeopardized.

V. Congressional and White House Reaction

Jewell provides wolves in Wyoming with a warranted reprieve, but the issue is far from settled. The federal government and Wyoming have filed separate appeals. Additionally, Wyoming Gov. Matt Mead believes that congressional action will be necessary to resolve the wolf

101. Greater Boston TV Corp. v. Federal Commc'ns Comm'n, 444 F.2d 841, 850-51 (D.C. Cir. 1970).
102. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983).
103. Wyoming v. U.S. Dep't of Interior, Case No. 09-CV-118J (D. Wyo. Nov. 18, 2010).
104. 74 Fed. Reg. at 15149.
105. 74 Fed. Reg. at 15170, 15176.
106. 74 Fed. Reg. at 15170.
107. *Id.*

conflict.[108] A congressional backlash has been generated by the Wyoming decision, along with another earlier federal district court decision. The U.S. District Court for the District of Columbia in *Humane Society of the United States v. Jewell*[109] invalidated DOI's delisting of wolves in the Western Great Lakes (WGL) DPS, which includes Michigan, Minnesota, Wisconsin, and portions of six other states.[110] The court held that the structure, history, and purposes of the ESA do not allow FWS to use the DPS designation solely to delist those wolves from the larger species or subspecies designation.[111] Alternatively, if the DPS designation can be used to delist those wolves from the higher listing, the WGL DPS delisting is not supported by the record.[112]

There were diverse reactions to the *Humane Society* decision by environmental groups. The plaintiff Humane Society praised the decision[113] but the National Wildlife Federation criticized it.[114] David Mech, an American wolf expert and senior research scientist for DOI's U.S. Geological Survey, stated, "I can see the Republicans gutting the entire ESA" over the wolf decisions.[115]

A. Congressional Backlash

Republicans took control of Congress in 2015. Reacting to the court decisions, congressional Republicans are considering attaching a rider to an appropriations bill that will restore DOI's regulations delisting wolves in Wyoming and the WGL and preclude judicial review of the regulations. The effort is being led by Rep. Reid Ribble (R-Wis.) and is cosponsored by Reps. Dan Benishek (R-Mich.), Collin Peterson (R-Minn.), and Cynthia Lummis (R-Wyo.). Representative Ribble declared that he was "pursuing a bipartisan legislative fix that will allow Great Lake states to continue the effective work they are doing in managing wolf populations without tying the hands of the FWS or undermining the ESA." Representative Benishek added that "the language we are looking at would narrow and would address the recent court decision. It would not seek to change the ESA, but would be designed to meet the need in our region for responsible stewardship of the wolf population."[116]

This strategy had been successful earlier. As discussed above, Congress attached a rider (Section 1713) to the Defense Department Continuing Appropriation Act in 2011 that delisted the wolf in the NRM DPS except Wyoming and precluded judicial review of the delisting. The Wyoming congressional delegation attempted to emulate this success in 2011 by exempting the Wyoming agreement with the Obama Administration from judicial review. The House included a provision sponsored by Representative Lummis that precluded judicial review of any effort to delist wolves in Wyoming in the FY 2012 Interior Appropriations bill. Wyoming Sens. John Barrasso and Mike Enzi both supported the provision,[117] but it was excluded by the conference committee. Such an effort might fare better in the current Congress.[118]

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108. Ben Neary, *Wyoming, Feds to Appeal Restored Wolf Protections*, Assoc. Press, Dec. 5, 2014.
109. 24 U.S. Dist. LEXIS 175846 (D.D.C. Dec. 19, 2013).
110. 76 Fed. Reg. 81666 (2011).
111. *Humane Society*, 24 U.S. Dist. LEXIS 175846, at **86-154.
112. The district court found that DOI failed to explain why territory suitable for wolf occupation in the region is not a significant portion of the range; failed to consider the impact of combined mortality factors, such as disease and human-caused mortality, on the population; failed to weigh the adequacy of nonexistent state regulatory schemes; and did not explain why a state plan that allows the virtually unregulated killing of wolves in more than 50% of the state does not constitute a threat to the species. The court found DOI's analysis, which was restricted to the wolf's current range, inconsistent with most judicial interpretations, and said that the Department must adequately explain why portions of the historic range where the wolf is no longer present do not constitute a significant portion of the range. *Id.* at **154-82.
113. The Humane Society said:
> In the short time since federal protections have been removed, trophy hunters and trappers have killed more than 1,500 Great Lakes wolves under hostile state management programs that encourage dramatic reductions in wolf populations. We are pleased that the court has recognized that the basis for the delisting decision was flawed, and would stop wolf recovery in its tracks.

Great Lakes Wolf Hunting Ends Now, Plus Media Solutions, Dec. 20, 2014.
114. The National Wildlife Federation's take:
> By ignoring sound science and forcing wolves back under the ESA, the ruling removes many of the tools used by state managers to resolve the increasing number of wolf-human conflicts. Without an ability to address these negative interactions, public attitudes towards wolves and their recovery will continue to erode, placing the wolves' future in peril.

Federal Court Ruling Not in Great Lakes Wolves' Best Interest, Plus Media Solutions, Jan. 19, 2015.
115. *Federal Court Decision Relists Gray Wolves in Western Great Lakes Region as Endangered Species*, Plus Media Solutions, Jan. 7, 2015.
116. Steve Karnowski, *Bill Would Remove Federal Protections for Wolves in 4 States*, Assoc. Press, Jan. 13, 2015. *Bill Would Strip Federal Protection for Wolves in Wyoming, Great Lakes,* Plus Media Solutions, Feb. 17, 2015. H.R. 884, to direct the Secretary of the Interior to reissue final rules relating to listing of the gray wolf in the WGL and Wyoming under the ESA of 1973.
117. *See Wyoming Congresswoman Wants Wolf Deal Free From Court Review*, Lewiston Morning Trib., July 7, 2011; Interior Appropriations Bill Marked-Up, Cong. Docs., July 13, 2011; *State-Federal Wolf Deal Needs Lawsuit Protection*, State News Serv., July 11, 2011; *Enzi Encouraged by Wolf Management Agreement*, Capitol Hill Press, Aug. 3, 2011; *Wyoming, Feds Announce Plans to Delist*, Assoc. Press, Aug. 4, 2011.
118. This tactic of constraining environmental legislation through appropriation riders should be invalidated under various alternative legal theories. The attachment of the Ribble rider on an unrelated appropriation bill would violate congressional rules that no substantive legislation can be attached to an appropriation bill. *See* Senate Rule XVI (2012); House Rule XXI (2)(b) (2012). Courts have enforced congressional rules. *See* United States v. Ballin, 144 U.S. 1 (1892); Cristoffel v. United States, 338 U.S. 84 (1949); Yellin v. United States, 374 U.S. 109 (1963). The Ribble rider would violate the public trust doctrine, which requires Congress to manage public resources in the long-term public interest. *See* Anna R.C. Casperson, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 Envtl. Aff. 357, 358-62 (1996). The public trust doctrine establishes a limited property right for the public in species protection and balanced public land management. *See* Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 559-61 (1970). The Ribble rider would violate the Due Process Clause of the Fifth Amendment by impinging on the public's limited property right through a process prohibited by congressional rules. *See* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311, 312-13 (1988); Mark Sagoff, *On Preserving the Natural Environment*, 84 Yale L.J. 205, 265-67 (1974). The Ribble rider would also violate the Equal Protection component of the Fifth Amendment by providing unique treatment for the Wyoming and WGL wolves. The Ribble rider should be subject to heightened judicial scrutiny because of the importance of the wolf to ecosystem maintenance and the preservation of biodiversity. *See* Stop H-3 v. Dole, 870 F.2d 1419, 1430, 19 ELR 20873 (9th Cir. 1989); *see also* William D. Araiza, *The Trouble With* Robertson: *Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1089-1101 (1999); Victor M. Sher &

Environmental groups are attempting to counter this strategic move. Twenty groups have petitioned DOI to reclassify the gray wolf as a threatened species across the continental United States,[119] except the Southwest where the Mexican wolf will retain endangered status. This reclassification would prevent recreational hunting and trapping, but permit federal removal of problem wolves. The Center for Biological Diversity has declared that the way forward "is to downlist wolves to threatened, replace the failed piecemeal efforts of the past with a new science-based national recovery strategy," and return wolves to "places where they once lived. . . ."[120]

There are other risks in the current Congress. Wolf reintroduction and recovery are part of a larger battle over the ESA. Various bills were proposed in the last Congress that would severely limit the scope of the ESA. In July 2014, the House passed the Endangered Species Transparency and Reasonableness Act, requiring the federal government to: (1) publish all information regarding listing decisions online; (2) report to Congress annually and make available online the amount of federal taxpayer funds used to respond to ESA litigation and attorneys fees awarded in the course of ESA litigation and settlement agreements; (3) provide the states all of the data used to justify listing decisions and utilize the data from states, tribes, and local government in making listing decisions; and (4) limit the amount of attorneys fees awarded to prevailing parties in ESA citizen suits.[121] Corresponding bills were introduced in the Senate.[122]

Environmental groups have criticized the legislation. The Center for Biological Diversity, for example, called it "remarkably short sighted legislation" and "another Republican scheme to push politics and corporate profits ahead of protecting endangered species and long term health of the world we live in." The group opined that, "Diverting the FWS budget and manpower to punitive reporting requirements hamstrings endangered species recovery efforts. This is nothing more than a Tea Party gift to oil and gas industry and other powerful special interests."[123]

B. White House Reaction

Threats are also emanating from the executive branch. The Obama Administration proposed delisting the wolf across much of the United States, even though wolves have recovered in less than 10% of their historic habitat. Wolves are dispersing throughout their historic habitat, where they need ESA protection to survive. There have been 56 instances over the past 30 years where wolves have dispersed from existing core recovery areas to states within their historic range. The Administration's proposal relies on questionable scientific evidence and was developed through a dubious process. It focuses on the current range of the wolf, but fails to recognize that the wolf is still missing from significant portions of its historic range where suitable habitat remains.[124]

A recent Center for Biological Diversity report concluded that there is up to 530,000 square miles of suitable wolf habitat in the United States, only 171,000 square miles of which is occupied. This is 30% of the existing suitable habitat. Areas in the central and southern Rocky Mountains, Grand Canyon, northern Arizona, the Cascade Mountains in Washington, Oregon, and California, the Sierra Nevada Mountains in California, the Olympic Peninsula in Washington, Michigan's lower Peninsula, upstate New York, Vermont, New Hampshire, and Maine are capable of supporting wolf populations that will maintain ecological balance and protect biodiversity.[125] One of the authors stated: "There's still so much more room for wolves in the lower 48 states. Rather than pulling the plug on wolf recovery before the job is done, we ought to be looking at ways to bring these animals back."[126]

Carole Sue Hunting, *Eroding the Landscape, Eroding the Law: Congressional Exemptions From Judicial Review of Environmental Laws*, 15 Harv. Envtl. L. Rev. 435, 482-85 (1991); Kathleen M. Vanderziel, *The Hatfield Riders & Environmental Preservation: What Process Is Due?*, 19 Envtl. Aff. 431, 461-65 (1991). Congress could not remove federal court jurisdiction over the constitutional issues. *See* Theodore Eisenberg, *Constitutional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 504-33 (1974). The Ribble rider would undermine the ESA, which mandates that decisions be based on science, not politics. *See* Fitzgerald, *supra* note 29, at 398-419 (2014); Edward A. Fitzgerald, *Wolf Delisting: Old Wine in New Bottles*, 44 ELR 10413, 10414-16 (May 2014).

119. Press Release, Center for Biodiversity (Mar. 4, 2015).

120. Press Release, Center for Biological Diversity (Jan. 27, 2015). *See also* John Myers, *Pro-Wolf Groups Seek Threatened Status*, Bismark Trib., Jan. 29, 2015; Tony Kennedy, *In Order to Protect Wolves, Advocates Seek Middle Ground*, Star Trib., Jan. 29, 2015.

121. Endangered Species Transparency and Reasonableness Act, H.R. 4315, 113th Cong. (2014). *See also U.S. House Amendments to ESA Would Burden Agencies*, Plus Media Solutions, Aug. 11, 2014.

122. 21st Century Endangered Species Transparency Act, S. 2635, 113th Cong. (2014); Endangered Species Litigation Reasonableness Act, S. 2748, 113th Cong. (2014); Endangered Species Recovery Transparency Act, S. 2752, 113th Cong. (2014). Representative Lummis reintroduced H.R. 1667, the 21st Century Endangered Species Transparency Act, which would require data used for ESA listings to be made public and accessible through the Internet. This bill is identical to S. 292 introduced by Sen. John Cornyn (R-Tex.). Liz Klebaner, *"21st Century Endangered Species Transparency Act" Introduced in House,* Endangered Species Law & Policy, Mar. 30, 2015, http://www.endangeredspecieslawandpolicy.com/2015/03/articles/regulatory-reform/21st-century-endangered-species-transparency-act-introduced-in-house/.

123. *House of Representatives Enacts Bill to Weaken ESA*, Plus Media Solutions, Aug. 12, 2014.

124. 78 Fed. Reg. 35664 (proposed June 13, 2013). *See also* Edward A. Fitzgerald, *Wolf Delisting: Old Wine in New Bottles*, 44 ELR 10413 (May 2014).

125. *See* Amaroq Weiss et al., Center for Biological Diversity, *Making Room for Wolf Recovery: The Case for Maintaining ESA Protections for America's Wolves* (2014).

126. Center for Biological Diversity, Newsletter, Nov. 6, 2014.