Delisting Wolves in the Northern Rocky Mountains: Congress Cries Wolf

by Edward A. Fitzgerald

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Editors' Summary

A battle is waging in the Northern Rocky Mountains, with environmental groups supporting the return of the wolf to the region to restore ecological balance, and the livestock industry fighting the species' return based on the threat it is perceived to pose to the industry's economic success. Recent federal court decisions in Montana regarding the delisting of wolves and in Wyoming regarding the FWS rejection of the Wyoming wolf management plan are the latest results of the ongoing fight. This year, Congress passed a resolution delisting the wolf and instructing the FWS to reconsider Wyoming's wolf management plan. This rider may threaten wolf recovery in the region, and precluding judicial review of the delisting undermines the partnership between courts and executive agencies that supports the modern administrative state.

The return of the children of the night to the Northern Rocky Mountains (NRM) has been one of the most contentious campaigns in the wolf war. Environmental groups support the return of the wolf, a summit predator, to restore ecological balance, maintain biodiversity, and preserve the genetic heritage. The livestock industry views the return of its nemesis as a threat to its economic vitality. Hunters oppose the return of the wolf, which is a competitor for the killing of large game. Western states are hostile to the return of the wolf, which is seen as an infringement of traditional state authority over wildlife and another example of federal public land policy that threatens vital state economic and cultural interests.

This Article will provide a brief history of the campaign, which demonstrates the important role of the courts in wolf recovery. It will analyze the Montana federal district court decision in 2010 restoring endangered and threatened species status to wolf in the NRM. It will point out that the court's decision, which held that the NRM Distinct Population Segment (DPS)[1] can not be subdivided on a state-by-state basis, was correct. Several post-litigation events that raise questions about the decision are examined. Wyoming federal district court determined that the U.S. Fish and Wildlife Service's (FWS')[2] rejection of Wyoming's wolf management plan was arbitrary and capricious. A recent scientific study indicates that genetic connectivity has occurred between the three wolf subpopulations in the NRM.

The U.S. Congress entered the campaign. Bills to delist the wolf in Idaho, Montana, and across the United States were introduced. Language delisting the wolf in the NRM DPS, except Wyoming, and precluding its judicial review was in the Continuing Resolution (CR) for fiscal year (FY) 2011. Facing congressional hostility, a settlement agreement was negotiated but rejected by the Montana fed-

1. In 1996, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) adopted a joint policy for purposes of listing, reclassifying, and delisting vertebrate species under the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18. 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996). DPS is defined as a group of vertebrate animals that is both discrete from and significant to the taxon as a whole. The population is discrete if it is "markedly separate from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavior factors," or "it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of [§]4(a)(1)(D) of the Act." *Id.* at 4725. The significance of the DPS is determined by its importance to the taxon as a whole. Indicators include, but are not limited to, "the use of an unusual or unique ecological setting; a marked difference in genetic characteristics; or the occupancy of an area that, if devoid of species, would result in a significant gap in the range of the taxon." *Id.* at 4724-25. If the population is both discrete and significant, it can be evaluated pursuant to the five criteria of §4(a)(1) for listing, downlisting, or delisting.
2. The FWS is the agency in the U.S. Department of the Interior (DOI) responsible for ESA implementation.16 U.S.C. §1532(15); 50 C.F.R. §402.01(a), (b).

eral district court. Congress then passed the CR, which included the delisting language and instructed the FWS to reconsider Wyoming's plan in light of the Wyoming district court decision. This rider may threaten wolf recovery in the NRM, which is currently experiencing wolf hysteria. Precluding judicial review of the delisting undermines the partnership between courts and executive agencies that supports the modern administrative state.

I. Wolf Litigation in the NRM

The gray wolf occupied almost all the continental United States.[3] The expansion of human settlement, the move westward, the growth of agriculture and the livestock industry, trapping and hunting, competition with hunters, and federal and state predator control led to the extermination of the wolf. By the 1970s, the gray wolf had been extirpated from more than 95% of its historic range.

Following the enactment of the Endangered Species Act (ESA)[4] in 1973, various subspecies of the gray wolf were granted protection[5]: the NRM wolf in 1973; the eastern timber wolf in 1974; the Mexican gray wolf in 1976; and the Texas gray wolf in 1976. In 1978, the FWS moved away from subspecies protection and listed the gray wolf as an endangered species throughout the United States, except in Minnesota, where the wolf was downlisted to a threatened species.

The FWS recognized the importance of subspecies distinctions, so recovery plans and management decisions continued to focus on subspecies. The FWS completed a recovery plan for the eastern timber wolf in 1978, which was revised in 1992; for the NRM wolf in 1980, revised in 1987; and for the Mexican wolf in 1982. In 1994, the FWS considered a proposal to develop a national recovery plan that would incorporate the three recovery plans and provide a national strategy for gray wolf recovery, but this effort was abandoned.

A. *Wyoming Farm Bureau Federation v. Babbitt*

Gray wolves from Canada were naturally recolonizing northwest Montana. Gray wolves were reintroduced into Wyoming and Idaho in 1995 and 1996 as nonessential experimental population pursuant to §10(j) of the ESA.[6] The Wyoming Farm Bureau Federation (WFBF) brought suit challenging the reintroduction. The federal district court in Wyoming held that the reintroduction of wolves into Wyoming and central Idaho violated §10(j) of the ESA.[7] The U.S. Court of Appeals for the Tenth Circuit reversed and found the potential occurrence of an individual naturally dispersing wolf in the experimental area did not violate §10(j) because an individual dispersing wolf did not constitute a population. The FWS determination that the experimental population was "wholly separate geographically" from the natural population and released outside "the current range" of the natural population was upheld. The Tenth Circuit also found that the Secretary of the Interior could treat all wolves in the experimental population area as part of the experimental population.[8] Wolves in the NRM soon exceeded recovery goals.

B. *Defenders of Wildlife v. Secretary of the Interior*

The gray wolf also prospered in the Western Great Lakes (WGL) region and surpassed recovery goals. Gray wolves from Minnesota migrated into northern Wisconsin and northern Michigan to form a Great Lakes metapopulation. The existence and identity of the wolves in the Northeast was unknown.[9]

Mexican wolves were reintroduced into the Blue Range Wolf Recovery Area in New Mexico and Arizona in 1998

3. The Southeast was inhabited by the red wolf. For an overview of the red wolf controversy, see Edward A. Fitzgerald, *Seeing Red:* Gibbs v. Babbitt, 13 Vill. Envtl. L.J. 1 (2002).
4. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
5. The listing process begins with a petition submitted by a concerned party. The DOI has 90 days to determine if there is "substantial scientific or commercial information" to go forward. 16 U.S.C. §1533(b)(3)(A). If there is substantial information, the DOI has one year to determine whether to list the species and the range of its protection. The DOI, utilizing the best scientific evidence available, must determine if the species is facing "1) the present or threatened destruction, modification, or curtailment of its habitat or range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) the inadequacy of existing regulatory mechanisms; 5) other natural or manmade factors affecting its continued existence." 16 U.S.C. §1533(a)(1). Each factor is equally important. If the Secretary of the Interior finds that a species is adversely affected by one factor, the species must be listed as endangered or threatened. The same process is followed for the downlisting and delisting of the species. 50 C.F.R. §424.11(d).
6. 68 Fed. Reg. 15804, 15806, 15817-18 (Apr. 1, 2003). Section 10(j) permits the Secretary to introduce an experimental population of an endangered or threatened species, which is "wholly separate geographically from the nonexperimental populations of the same species" and "outside the current range of species," if "such release will further the conservation of the species." 16 U.S.C. §1539(j). The Secretary must decide "whether or not such population is essential or nonessential to the continued existence of an endangered species or a threatened species." The experimental population is treated as a threatened species, so is subject to §4(d) regulation. For the purpose of §7, a nonessential experimental population is treated as a threatened species only when in a National Park or National Wildlife Refuge. The federal agency must consult with the DOI to determine that its action will not harm the species or its habitat. 16 U.S.C. §1539(j)(2)(B), (C). If outside a National Park or National Wildlife Refuge, a nonessential experimental population is treated as a species proposed for listing. The federal agency must confer with the DOI to determine if its action will jeopardize the species. 16 U.S.C. §§1536(a)(1), (4). The results of the conference are only advisory and do not restrict the agency from proceeding with the action. 70 Fed. Reg. at 1287.
7. Wyoming Farm Bureau Fed'n v. Babbitt, 987 F. Supp. 1349 (D. Wyo. 1997).
8. Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1235-37, 30 ELR 20289 (10th Cir. 2000). *See generally* Edward A. Fitzgerald, Wyoming Farm Bureau Fed'n v. Babbitt: *The Children of the Night Return to the Northern Rocky Mountains*, 16 J. Nat. Resources & Envtl. L. 1 (2001-2002).
9. 68 Fed. Reg. at 15805, 15810 (Apr. 1, 2003).

as a nonessential experimental population.[10] The New Mexico Cattlegrower's Association (NMCGA) brought suit challenging the reintroduction. The federal district court in New Mexico upheld the FWS decision. The court rejected the NMCGA allegations regarding the livestock depredation rates, the hybridization of the reintroduced population, the existence of a naturally occurring Mexican wolf population, the impact on other endangered and threatened species, federal consultation with state and local governments, and the need for a Supplemental Environmental Impact Statement.[11]

The FWS in 2000 proposed the establishment of four DPSs in the WGL, Northeast, West, and Southwest and the downlisting of the gray wolf from an endangered to threatened species throughout most of its historic range, except the Southwest.[12] The Final Rule issued in 2003 established only three DPSs in the East, West, and Southwest. Gray wolves in the Eastern and Western DPS were downlisted to threatened species status, but the regulation regarding the nonessential experimental populations in Wyoming and Idaho remained in place. The downlisting permitted their taking pursuant to §4(d) regulations and moved the gray wolf one step closer to delisting.[13]

Defenders of Wildlife (Defenders) brought suit challenging the downlisting of gray wolf across much of its historic range in the eastern and western DPS. The federal district court in Oregon in *Defenders v. Secretary of the Interior* rejected the U.S. Department of the Interior's (DOI's) action. The court determined that the Secretary's interpretation of "significant portion" of the gray wolf's range was contrary to the ESA and case law. The Secretary's implementation of the DPS policy violated DOI's own regulation and the ESA. Since the Secretary's analysis was limited to the gray wolf's current range, her conclusions regarding the five downlisting factors set forth in §4(a) of the ESA were invalid. Nevertheless, the court did find DOI's analysis was sufficient to support the creation of two DPSs that encompass the current range of the gray wolf in the WGL and the NRM and the downlisting of the gray wolf in these two core areas to a threatened species.[14] As a result, the gray wolf remained an endangered species in the continental United States, except in Minnesota and the experimental population areas located in Arizona, Idaho, Montana, New Mexico, Texas, and Wyoming, where it was classified as a threatened species. The Vermont federal district court in *National Wildlife Federation v. Norton*, employing similar reasoning, found fault with the FWS proposal, particularly the abandonment of wolf recovery efforts in the Northeast.[15]

C. *Defenders of Wildlife v. Hall*

The FWS in 2005 promulgated a new §10(j) rule that granted western states and tribes with approved wolf management plans, specifically Montana and Idaho, expanded authority over the nonessential experimental population of wolves within their boundaries. States and tribes with wolf management plans were allowed to enter into cooperative agreements for the management of experimental populations on public land.[16]

Wyoming was not granted expanded authority because Wyoming's wolf management plan was inadequate. The FWS instructed Wyoming to change the wolf's status as a predator throughout most of the state. Designating wolves as "trophy game" statewide would permit the state to implement a management scheme that provided for a self-sustaining population above the recovery goals and regulated the taking of wolves. Wyoming also had to commit by law to manage at least 15 wolf packs in the state. Finally, Wyoming's definition of pack had to be biologically based and consistent with the Idaho and Montana definition.[17]

Wyoming brought suit, alleging that its program was rejected because of politics, not science. The case was heard and dismissed by the federal district court in Wyoming in 2005.[18] The Tenth Circuit upheld the dismissal of Wyoming's suit in 2006.[19]

Wyoming petitioned to establish and delist wolves in the NRM DPS in 2005. The FWS rejected Wyoming's petition in 2006, citing continued problems with the state's management plan.[20] Wyoming again brought suit, which was rejected by federal district court.[21] Idaho and Montana, frustrated with Wyoming's intransigence, asked for the delisting of their wolves, but the FWS refused to consider state-by- state delisting.[22] Former Idaho Gov. Dirk Kempthorne replaced Gail Norton as Secretary of the Interior in 2006. Negotiations with Wyoming continued.

Wyoming enacted a statute that outlined state wolf management in 2007. The Wyoming Game and Fish Commission (WGFC) enacted implementing regulations in November 2007. The wolf was listed as a predator throughout most of the state, except in northwest Wyoming where it was designated as trophy game. Wyoming pledged to

10. 68 Fed. Reg. at 15808-10.
11. NMCGA v. U.S. FWS, 1999 U.S. Dist. Lexis 19096, at **2, 5, 58, 66, 69, 74-45, 78, 80. (D.N.M. Oct. 28, 1999). *See generally* Edward A. Fitzgerald, *Lobo Returns From Limbo*, 46 Nat. Resources J. 9 (2006).
12. 65 Fed. Reg. 43450 (July 13, 2000).
13. 68 Fed. Reg. at 15804, 15810, 15826, 15876.
14. Defenders of Wildlife v. Sec'y, U.S. Dept. of Interior, 354 F. Supp. 2d 1156, 1158-59, 1162, 1168, 1170-74 (D. Or. 2005). *See generally* Edward A. Fitzgerald, *Dysfunctional Downlisting Defeated*: DOW v. SOI, 34 B.C. Envtl. L. Rev. 1 (2007).
15. 386 F. Supp. 2d 553 (D. Vt. 2005).
16. 70 Fed. Reg. 1286, 1296-98 (Jan. 6, 2005), revised 73 Fed. Reg. 4720 (Jan. 28, 2008).
17. *Id.*; *see also* 70 Fed. Reg. at 61770, 61774 (Oct. 26, 2005).
18. Wyoming v. U.S. Dep't of Interior, 360 F. Supp. 2d 1214 (D. Wyo. 2005).
19. Wyoming v. U.S. Dep't of Interior, 442 F.3d 1262, 36 ELR 20067 (10th Cir. 2006).
20. 71 Fed. Reg. 43410 (Aug. 1, 2006).
21. 74 Fed. Reg. 15123, 15124 (Apr. 2, 2009), citing Wyoming District Court Case Number 2-06-CV-00245 (Feb. 27, 2008).
22. Mike Stark, *Montana, Idaho Still Seeks Delisting of Wolves*, Billings Gazette (July 28, 2006).

manage 100 wolves in the state. The FWS agreed to accept Wyoming's wolf management plan in December 2007.[23]

The FWS issued the final regulation designating the NRM DPS and removing it from the list of endangered and threatened species in February 2008.[24] The DPS included all of Idaho, Montana, and Wyoming, eastern Oregon, northern Utah, and eastern Washington. Central Idaho, northwestern Montana, and the Greater Yellowstone Area (GYA) were known to have wolf packs. Defenders brought suit challenging the regulation.[25]

In July 2008, Judge Donald Molloy in Montana federal district court issued a preliminary injunction, which restored ESA protections to the wolves in the NRM DPS. The court held that the FWS acted arbitrarily and capriciously because there was no genetic connectivity between the three wolf populations in the DPS area, which the FWS determined was necessary for the maintenance of a viable wolf population. The court also found that the FWS acted in an arbitrary and capricious fashion when it approved the 2007 Wyoming wolf management plan, which suffered from the same defects as the 2003 Wyoming plan rejected by the FWS.[26] At least 37 wolves were killed in the six-month interim between the regulation and the court's decision.

D. Defenders v. Salazar

In January 2009, the George W. Bush Administration attempted an 11th-hour delisting of the wolves in Idaho and Montana, but retained threatened species status for the wolves in Wyoming. The incoming Barack Obama Administration put a freeze on all pending regulations, including the NRM wolf delisting. In April 2009, Secretary of the Interior Ken Salazar upheld the FWS decision to delist the wolves in Idaho and Montana, but retained the ESA protections for wolves in Wyoming.[27] Defenders brought suit challenging the action.[28]

While suit was pending, the Gray Wolf Livestock Loss Mitigation Act, which was sponsored by Sens. Jon Tester (D-Mont.) and John Barrasso (R-Wyo.), was enacted.[29] The bill authorizes $1 million per year for five years for demonstration projects by the states and Indian tribes that are designed to assist livestock producers in undertaking proactive nonlethal measures to decrease the risk of livestock loss due to wolf predation and to compensate owners for such livestock loss. States with wolf populations are eligible to receive up to $140,000, but must provide matching state funds to qualify.[30] After passage of the Act, Defenders announced that its compensation payments to stock owners who suffered wolf predation would end as soon as the requisite state legislation was in place.[31]

After delisting, the states and Nez Perce Tribe planned wolf hunts to manage their wolf populations and raise revenue. Planned hunts allowed the killing of 220 wolves in Idaho (25% of the state population), 75 wolves in Montana (15% of the state population), and 35 wolves on Nez Perce lands.[32] Environmental groups sought a preliminary injunction to halt the wolf hunts. In September 2009, Judge Molloy refused to issue an injunction halting the hunt. The court held that there was no showing of irreparable harm. Experts asserted that a 30% reduction of the wolf population in the region would not jeopardize the wolf population. The maximum projected killing of 330 wolves in the hunts would only reduce the wolf population by 20%, well within acceptable limits. The court did, however, find that the environmental plaintiffs were likely to prevail in the full trial on the merits because the Secretary could not subdivide the NRM DPS by retaining endangered species status for wolves in Wyoming. The balance of the equities and public interest also favored the plaintiffs because the ESA prioritized the recovery of endangered and threatened species.[33]

By the end of the 2010 season, hunters in Montana killed 72 wolves, and wildlife agents killed 145 wolves for depredation. In Idaho, hunters killed 134 wolves, and wildlife agents killed 93 wolves. In Wyoming, wildlife agents killed 32 wolves. This left 525 wolves in Montana, 843 wolves in Idaho, 320 wolves in Wyoming, 5 wolves in Washington, and 14 wolves in Oregon in spring 2010.[34]

Environmental groups were very critical of the delisting decision and the Obama Administration's overall wildlife policy.[35] Environmental groups pursued another strategy. The Center for Biodiversity (CBD) petitioned the FWS to establish a national recovery plan for wolves. A similar effort by the Natural Resources Defense Council (NRDC)

23. 74 Fed. Reg. at 15170. 15149.
24. 73 Fed. Reg. 10514 (Feb. 27, 2008).
25. Defenders represented the Natural Resources Defense Council (NRDC), Sierra Club, Humane Society of the United States, Center for Biological Diversity (CBD), Jackson Hole Conservation Alliance, Friends of the Clearwater, Alliance for the Wild Rockies, Oregon Wild, Cascadia Wildlands Project, Western Watersheds Project, and Wildlands Project.
26. Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1168-76 (D. Mont. 2008).
27. 74 Fed. Reg. 15123 (Apr. 2, 2009).
28. Defenders represented NRDC, Sierra Club, Humane Society of the United States, CBD, Jackson Hole Conservation Alliance, Friends of the Clearwater, Alliance for the Wild Rockies, Oregon Wild, Cascadia Wildlands, Western Watersheds Project, Wildlands Network, and Hells Canyon Preservation Council.
29. Hearings: Current Public Lands and Forests Legislation, Sen. Comm. Energy and Natural Resources, Subcomm. Public Lands and Forests, 110 Cong., 2d Sess. (July 9, 2008).
30. Pub. L. No. 111-11, §6201, Wolf Compensation and Prevention Program (2009).
31. Defenders paid $1.4 million in compensation since 1987. In the past five years, Defenders provided ranchers in the six NRM states between $101-$240,000 per year. Gov. Butch Otter (R-Idaho) accused Defenders of breaking "one of its original promises devised to increase public acceptance of this species that was forced upon us by the federal government." Defenders responded: "Defenders have done more than any other conservation group to assist ranchers . . . it's unfortunate that it was not appreciated by some." *Conservation Groups Ends Wolf Predation Payments*, Lewiston Morning Trib., Sept. 1, 2010.
32. 74 Fed. Reg. at 15147.
33. Defenders of Wildlife v. Salazar, Case 9:09-CV-00077-DWM 5-14 (Sept. 8, 2009).
34. *Report: Wolf Population Rose Last Year in Northern Rockies, but at Slower Rate*, Lewiston Morning Trib., Mar 12, 2010.
35. Paul Rogers, *Obama Decisions on Wildlife Raising Environmentalists' Ire*, San Jose Mercury News, Feb. 21, 2010. Jaime Rapport Clark, *An Interior Decision Imperils More Than Wolves*, Wash. Post (Jan. 1, 2010).

in 2008 had been rejected.[36] A CBD spokesman stated: "DOI's failure to develop a national recovery strategy for the wolf . . . has led to tremendous confusion and hampered true wolf recovery. Wolves have been an integral part of the North American landscapes for millions of years and are cherished, iconic animals that deserve a certain future in this country."[37]

In August 2010, Judge Molloy rejected the Obama Administration's delisting proposal because the NRM DPS cannot be subdivided on a state-by-state basis. The court found that the text of 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 "significant portion of the range" language cannot be utilized to change the definition of an endangered or threatened species. Since Wyoming constitutes "a significant portion of the range" of the NRM DPS, wolves in the DPS cannot be delisted until Wyoming develops an adequate state management plan.[38]

The court's decision on this legal question was correct.[39] The ESA does not allow the piecemeal delisting of the DPS. The plain language of the ESA only permits the listing, reclassification, and delisting of species, subspecies, and DPS.[40] Once designated, the ESA protections apply to the entire DPS. The regulations establish the DPS as a single unit through the FWS' determination of the discreteness and significance of the DPS. The "significant portion of their range" language is only relevant for the purpose of listing, reclassification, or delisting of a species, subspecies, or DPS. The FWS determined that Wyoming, which lacks an approved state management plan, constitutes a significant portion of the range of the NRM DPS, so delisting the NRM DPS was not permitted.

The FWS' interpretation conflicted with the agency's earlier position that the DPS is a single unit. In 2003, the FWS declared that "delisting can only occur when a species (or subspecies or DPS) is recovered. . . ."[41] In 2005, the FWS stated that "at this time the Act does not allow wolves to be delisted on a State-by-State basis."[42]

The FWS' position was based on a 2007 memo by the DOI Solicitor, which focuses on the current range of the species. The Memo asserts that the "significant portion of the range" language can be used to change the status of wolves in the different regions of the DPS.[43] Since the wolf is recovered in Idaho and Montana, it should be delisted in these states, and ESA protections should only be retained in Wyoming.

The memo changes the delisting process. The FWS is essentially creating another DPS within the NRM DPS. This contradicts the text of §4(c)(1), which indicates that the only relevant units of analysis are species, subspecies, and DPS.[44] The legislative history indicates that DPS is the means for providing differential treatment for a species.[45] Furthermore, the FWS previously determined that state lines cannot be used in designating DPS boundaries, unless the state lines incidentally separate two DPSs.[46]

FWS cited the reclassification of wolves in Minnesota from endangered to threatened species in 1978 to demonstrate the Secretary's flexibility pursuant to §4(c)(1) to revise a species status. The reclassification in 1978 is not analogous to subdividing the DPS. Treating a DPS whose conservation status is different from a species or subspecies listing is acceptable under §4(c)(1).[47] The DPS is a single unit that is distinguishable from its constituent elements. The FWS recognized the wolf population in the NRM DPS as a single unit. Section 4(c)(1) only allows the Secretary to revise the status of the entire DPS.

Federal courts have consistently found the DPS to be a single unit for ESA purposes. In *NWF v. Norton,* the federal district court held that "the FWS cannot exclude portions of a DPS from listing a species. Once a DPS is formed, it is treated uniformly throughout the DPS."[48] The federal district court in *Alsea Valley Alliance v. Evans* noted that "listing distinctions below that of subspecies or a DPS of species are not allowed under the ESA."[49] The U.S. Court of Appeals for the Ninth Circuit reinforced this interpretation in *Trout Unlimited v. Lohn*.[50]

II. Post-Litigation Developments

There have been several developments that question the basis of the 2010 Montana federal district court decision. Wyoming federal district court in 2010 determined that

36. Matthew Brown, *Wolves: Biologists File Petition Seeking Nation Wide Recovery*, Lewiston Morning Trib. (July 21, 2010).
37. Kelly Zito, *Group Wants Wolves Back in California*, San Francisco Chron. (Dec. 29, 2010).
38. Defenders of Wildlife v. Salazar, CV 09-77-M-DWM, CV 09-82-M-DWM (D. Mont., Aug. 5, 2010). *See generally* 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).
39. The U.S. Supreme Court in *Chevron v. NRDC* developed a two-step process regarding judicial review of an agency's legal interpretation. First, the court must determine "whether Congress has directly spoken to the precise question at issue." If Congress has not addressed the issue, the court can "not simply impose its own construction of the statute." Instead, the court must move to the second step to determine "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 842-43, 14 ELR 20507 (1984).
40. 16 U.S.C. §§1532(6), (16), (20).
41. 68 Fed. Reg. 15804, 15825 (Apr. 1, 2003).
42. 70 Fed. Reg. 1286, 1296 (Jan. 6, 2005).
43. DOI, Office of Solicitor, The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of Its Range" (Mar. 16, 2007).
44. The U.S. Court of Appeals for the Ninth Circuit declared that the "plain language of the statute" mandates "a status review of [an] entire species—no more, and no less." Trout Unlimited v. Lohn, 559 F.3d 946, 957 (9th Cir. 2009). The court stated "if [FWS] decides to list a species or a distinct population segment as endangered or threatened, it must accord the species or distinct population segment [the] various legal protections" of the ESA. *Id.* at 949-50.
45. Defenders of Wildlife v. Salazar, CV 09-77-M-DWM, CV 09-82-M-DWM, 44-46.
46. 61 Fed. Reg. 4723-24.
47. Fitzgerald, *supra* note 38, at 25-38.
48. 386 F. Supp. 2d 553, 564 n.9 (D. Vt. 2005).
49. Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001).
50. The Ninth Circuit stated: "*Alsea I* stands for the separate and distinct proposition that once NMFS determines that hatchery and naturally spawned salmon belong to the same ESU [DPS], it may not list the naturally spawned portions to the exclusion of the hatchery portion of the ESU." 559 F.3d at 960-61.

the FWS' rejection of the Wyoming wolf management plan in 2009 was arbitrary and capricious. This contradicts the Montana federal district court decision in 2008, which found the FWS acceptance of a similar Wyoming plan in 2007 arbitrary and capricious. Furthermore, a recent scientific study determined that there is genetic connectivity in the NRM DPS. This is contrary to an earlier study by the same authors, which was relied upon by the Montana court in its 2008 decision.

A. Wyoming v. United States

In 2008, Judge Molloy determined that the FWS' failure to explain why it approved Wyoming's plan, which had earlier been rejected, was arbitrary and capricious. In October 2008, Wyoming submitted a revised plan maintaining the dual classification of trophy game in northwest Wyoming and predators in the remainder of state. Wyoming commits to managing 15 breeding pairs with a total population consisting of at least 150 wolves. Seven breeding pairs will be maintained outside national parks and public lands in northwest Wyoming. If there are less than eight breeding pairs inside national parks for two consecutive years, the WGFC will manage additional breeding pairs to meet the 15 breeding pairs and 150-wolf population goals. Property owners in northwest Wyoming can still take wolves "doing damage to private property." The WGFC promises to manage wolves "so that genetic diversity and connectivity issues do not threaten the gray wolf population."[51]

The FWS rejected Wyoming's management plan in January 2008.[52] The FWS determined that Wyoming's regulatory framework does not guarantee that the state will be able to manage its share of the wolf population in the NRM DPS. Wyoming must commit to managing 150 wolves in 15 breeding pairs in midwinter and 70 wolves in seven breeding pairs in midwinter outside the national parks. The FWS instructed Wyoming to manage its wolf population to maintain high levels of genetic diversity and to facilitate genetic exchange. The FWS found the current framework limits natural genetic connectivity. Genetic exchange between the three wolf populations in the NRM DPS will be more likely if dispersers have safe passage through the entire state, which will be promoted by a statewide trophy game designation. The statewide trophy designation will help Wyoming to devise more flexible management strategies. Furthermore, the FWS suggested that Wyoming authorize the defense-of-property taking of wolves in a manner similar to the §10(j) regulations and consider all sources of mortality, including hunting and defense of property, in its total statewide mortality limits.[53] Wolf management in Wyoming remains subject to the 1994 experimental population regulations.[54]

In 2010, Judge Alan Johnson in the Wyoming federal district court examined the FWS' rejection of the Wyoming wolf management plan in 2009 and determined that the FWS offered no new scientific evidence to support its insistence on a statewide trophy game designation. The court, relying on the FWS approval of the Wyoming plan in 2008, held that the Wyoming plan with its malleable trophy game area does not pose any risk to genetic connectivity and dispersal in the near future. The court was confident that Wyoming will not reduce the trophy game area to keep its wolf population at a minimum, because Wyoming is committed to maintaining its recovery obligations. The court conceded that state predator control is more stringent than the §10(j) rule, but its impact must be analyzed in terms of a larger trophy game area. The court found the FWS rejection of the Wyoming plan arbitrary and capricious. The FWS was mandated to reconsider the Wyoming plan and determine if a larger trophy game area, not the entire state, will achieve genetic connectivity.[55]

Wyoming federal district court focused solely on the FWS' acceptance of the state plan in 2008, but ignored the FWS' prior and subsequent rejections that mandated a statewide trophy game designation. FWS acceptance of the state plan in 2008 was the aberration. Following the Montana federal district court decision in 2008, the FWS 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 pop 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.[56]

The Wyoming district court decision on this policy question was dubious.[57] The Wyoming court substituted its judgment for that of the FWS under guise of the "best science." Wyoming's plan only protects the wolf in 12% of the state. Wolves in Wyoming will leave the trophy game area to seek food and establish new territory. Wyoming maintains 22 winter elk feeding stations, 12 of which are in predator control areas. These areas will attract wolves. History indicates that wolves leaving the trophy game area will be terminated in predator control areas. After the

51. Wyoming Game & Fish Comm'n, 2008 Draft Revision, Wyoming Gray Wolf Management Plan, 1-3 (Oct. 28, 2008).
52. 74 Fed. Reg. at 15125, 15149, 15172.
53. 74 Fed. Reg. at 15179, 15182-83.
54. 74 Fed. Reg. at 15125, citing 50 C.F.R. §17.84(i).
55. Wyoming v. Interior, Case No. 09-CV-118J (D. Wyo. Nov. 18, 2010).
56. 74 Fed. Reg. 15149.
57. Policy questions involve a mixture of legal and factual determinations. The court has to perform a thorough review of the agency's action "to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-51 (D.C. Cir. 1970).

2008 delisting, most of the wolves in the predator control area (17 of the 28) were killed within a few weeks.

Dispersing wolves from Idaho and Montana need access to the GYA. Physical barriers, such as mountains and high elevation, discourage dispersal from the north and west. Dispersers have greater access to the GYA from the east and south. Limited social opportunities in the national park will cause some dispersers to avoid the park. Wolves travelling to the GYA will have to traverse across Wyoming, where they face death in predator control areas.[58]

The Wyoming district court was confident that Wyoming will not adjust the trophy game area to keep the wolf population at bare minimum. The FWS admitted it did not consider the possibility of reduced trophy game area when it approved the Wyoming plan in 2008. Subsequently, the FWS expressed concern that any reduction in the trophy game area will cause an increase in the predator control area and endanger dispersal and connectivity.[59]

The Wyoming district court determined there was no danger to wolf recovery because Wyoming promised to manage 15 breeding pairs and 150 wolves. The FWS demanded statewide trophy game designation as the best means to attain wolf recovery in Wyoming. This will allow Wyoming "to regulate the methods of taking, hunting season, types of allowed takings, and number of wolves killed."[60] Wyoming's plan only meets the minimum recovery goals if there are less than eight breeding pairs in national parks for two years. Only then will additional wolves be permitted outside the national parks until the recovery goal is met. The FWS points out that such a reduction of the population for two years could jeopardize recovery. The FWS wants a margin of safety in state wolf management.

Recent scientific study has found that there is genetic connectivity between the three NRM wolf populations. This has occurred under statewide federal wolf management in Wyoming. The study warns that a population of sufficient size must be maintained and dispersal corridors must be protected to ensure adequate dispersal and genetic connectivity in the future.[61] The results of the study support FWS insistence on statewide management.

Wyoming's plan is deficient when compared to the federally approved plans of Idaho and Montana.[62] Idaho and Montana provide wolves with statewide protection under state statutes. Idaho and Montana establish hunting seasons with quotas. Idaho and Montana regulations on taking of depredating wolves are consistent with §10(j) regulations. By comparison, Wyoming only provides trophy game protection in 12% of the state. Wolves are classified as predators that can be shot on sight in the remaining 88% of the state. Wyoming is committed to keeping wolf numbers at a bare minimum. Wyoming's predator control law is more severe than §10(j) regulations. The Obama Administration decided not to appeal the decision, but to negotiate with Wyoming for a revised plan.

58. 74 Fed. Reg. at 15170, 15176.
59. *Id.* at 15170-71.
60. *Id.* at 15170, 15172, 15176.
61. 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).
62. 74 Fed. Reg. at 15167-70.

B. Connectivity

Montana federal district court in 2008 found that there was no connectivity between the three wolf populations in the NRM DPS. The FWS conceded this fact, but argued that such exchanges were likely given the wolf's mobility and fertility. Potential exchange, not actual exchange, was all that was required. Even if there had been no dispersal, the Yellowstone population had sufficient genetic diversity to preclude any genetic problems over the next 100 years. Other wolf populations existed with less diversity.[63]

Montana federal court determined that the FWS was attempting to reject its own recovery standards. In 1994, the FWS identified the recovery criteria for the NRM DPS as "thirty or more breeding pairs comprising some 300+ wolves in a metapopulation (a population that exists as partially isolated sets of subpopulations) with genetic exchange between populations."[64] The FWS stated: "It is fairly clear that ten breeding pairs in isolation will not comprise a 'viable population' (i.e., have a high probability of survival for a long period of time without human intervention)." The FWS stressed that "the importance of movement of individuals between subpopulations cannot be overemphasized."[65] The court determined that the FWS' reliance on likely future genetic exchanges contradicted its earlier position. The FWS failed to recognize that more wolves would be killed under state management, creating even less chance of genetic exchange. In the future, problems would be exacerbated, not alleviated. Furthermore, the court noted that the FWS was aware of the genetic diversity of the Yellowstone wolf population and the success of smaller isolated wolf populations, but still insisted that genetic exchange was required. No new evidence justified the FWS' change in position.[66]

Montana federal court in 2008 relied on studies that demonstrated that there was not or likely to be a functioning metapopulation of wolves in the NRM DPS.[67] One of these studies by Bridgett vonHoldt and colleagues in 2007 found that wolves in the GYA remained isolated.[68] VonHoldt concluded that "if the Yellowstone wolf population remains relatively constant at 170 individuals (estimated to be Yellowstone's carrying capacity), the population

63. For example, the Isle Royale wolf population had only two founders and experienced no genetic problems.73 Fed. Reg. at 10553-54.
64. 565 F. Supp. 2d at 1168.
65. 565 F. Supp. 2d at 1170.
66. 565 F. Supp. 2d at 1168-72.
67. 74 Fed. Reg. at 15157-58, citing John K. Oakleaf et al., *Habitat Selection by Recolonizing Wolves in the Northern Rocky Mountains of the United States*, 70 J. Wildlife Mgmt. 554 (2006); Carlos Carroll et al., *Defining Recovery Goals and Strategies for Endangered Species: The Wolf as a Case Study*, 56 BioScience 25 (2006).
68. 565 F. Supp. 2d at 1168-69, citing Bridgett vonHoldt et al., *The Genealogy and Genetic Variability of Reintroduced Yellowstone Gray Wolves*, 17 Molecular Ecology 252 (2007).

will demonstrate substantial inbreeding effects within 60 years."[69] There will be an "increase in juvenile mortality from an average of 23-40%, an effect equivalent to losing an additional pup in every litter." VonHoldt suggested that "to deter such inbreeding effects, migration will be needed, including translocation of wolves from elsewhere or the development of specific habitat corridors."[70] VonHoldt found "only low-quality corridors currently connect the GYA to the Idaho and northwestern wolf populations, exposing dispersers to high human-associated mortality risks." VonHoldt concluded that "the genetic impact of isolation may take decades to accumulate but can be delayed if gene flow with other populations is established and maintained."[71]

The FWS argued that the vonHoldt study, which it had commissioned, was not "the best scientific . . . data available."[72] The FWS criticized the study on several grounds: First, vonHoldt only examined 30% of the Yellowstone wolves and only sampled until 2004. There might have been some genetic exchange after 2004. Second, vonHoldt only looked at wolves in Yellowstone, not the GYA. Dispersal from central Idaho and northwest Montana into the GYA was very likely. Third, it was difficult to determine if there was genetic exchange because of the genetic similarity of wolves in the NRM DPS. Fourth, vonHoldt's predictions were based on erroneous assumptions that underestimated the carrying capacity of Yellowstone National Park. The court rejected the FWS argument and found the vonHoldt study to be of sufficient size and statistical significance. Evidence indicated that there had been only 4 to12 dispersals from or into other areas.[73]

A new study by vonHoldt and colleagues in 2010 admits that the earlier study was flawed and demonstrates that there is genetic connectivity between the populations in the three recovery areas. During the course of the 10-year study, the NRM wolf population increased from 101 to 846. VonHoldt concluded that the high genetic diversity evidenced during the first decade of reintroduction, resulting from an average 5.4 migrations per generation, is sufficient to avoid any genetic problems. VonHoldt 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. VonHoldt warned that a sufficient population and adequate dispersal corridors must be maintained to ensure connectivity.[74]

Successful genetic connectivity in the region occurred with a wolf population of 846. The current wolf population is 1,650. The FWS conceded that the population will be reduced after delisting. A wolf population above 1,500, the carrying capacity of the region, will be difficult to maintain because packs will compete for habitat and generate conflicts with livestock owners. The FWS posited that there will be at least 600 wolves, probably more than 1,000 wolves, in the NRM DPS. The FWS projected that the NRM DPS population will never go below 300 and will probably fluctuate between 973-1,302 wolves with 77-104 breeding pairs. Idaho and Montana are projected to have between 673-1,002 wolves with 52-79 breeding pairs, and Wyoming will have 300 wolves with 22 breeding pairs. The FWS asserted that this decline will have a negligible impact on dispersal and connectivity among subpopulations. Dispersal will continue even if the wolf population decreases by 23%. Dispersal will only be impacted if the wolf population is reduced below 150 in any state.[75]

Given the wolf hysteria in the region, these projections seem overly optimistic. Idaho, Montana, and Wyoming are only each required to maintain 15 breeding pairs and 150 wolves. Idaho and Wyoming seem committed to strictly adhering to this minimum number. Reducing the current wolf population toward 450 will threaten dispersal and genetic connectivity. The FWS acknowledged the necessity of a strong core population "to provide a steady influx of dispersing wolves" into suitable habitat. A small wolf population will lack the ability and incentive to leave the core areas and move into suitable habitat. The greater isolation of the wolf population will decrease the genetic diversity within each area and preclude repopulation in outside areas.[76]

Furthermore, the recovery goal is too low. The International Union for the Conservation of Nature and Natural Resources (IUCN) "red list" declares a population vulnerable, analogous to a threatened species designation, if the population decreases below 1,000 mature individuals, which are defined as adults that are capable of reproducing. The IUCN recognizes that only a small percentage of the wolf population contributes to its genetic heritage. Pups are incapable of reproducing. Only the alpha male and female reproduce.[77]

III. Wolf Hysteria Breaks Out

Recent events demonstrate that the NRM states are committed to managing wolves at minimum levels, which will pose a risk to wolf recovery. Following the 2010 Montana court decision, Idaho and Montana sought permission to conduct conservation hunts. Montana wanted to reduce its population to 439 by the end of 2010. Idaho sought to decrease its wolf population from 843 to 500 by end of 2010.[78] Idaho and Montana management plans project that their wolf populations can safely be reduced by human-caused mortality rates of 28-50%. This is consistent with

69. vonHoldt et al., *supra* note 68, at 269-70.
70. *Id.*
71. *Id.*
72. 565 F. Supp. 2d at 1169-71. *See also* 74 Fed. Reg. at 15133-34.
73. *Id.*
74. vonHoldt et al., *supra* note 61. *See also* Mark Hebblewhite et al., *Restoration of Genetic Connectivity Among Northern Rockies Wolf Populations*, 19 Molecular Biology 4383 (2010).
75. 74 Fed. Reg. 15130-38, 15142.
76. 72 Fed. Reg. 6119.
77. IUCN Red List of Threatened Species, http://www.iucnredlist.org.
78. Matthew Brown, *Montana Seek OK for Hunting of Endangered Wolves*, Lewiston Morning Trib. (Sept. 1, 2010).

literature on wolf harvesting.[79] However, a recent Montana State University study concluded that these thresholds are too high and will have an adverse long-term impact on the wolf population.[80] In October 2010, the FWS denied the state's request for a conservation hunt.[81] Senator Tester, chair of the Congressional Sportsmen's Caucus, disagreed stating "allowing a regulated hunt will expand the state's management options for this predator and restore balance to the system."[82]

Idaho and Montana also sought permission for smaller hunts pursuant to §10(j) regulation, which allows the killing of wolves by states and tribes when wolf predation is having an unacceptable impact on wild ungulate populations.[83] The FWS has approved Idaho's request to kill wolves in the Lolo district and Montana's proposal to decrease the wolf population in the Bitterroot region.[84]

Idaho's Memorandum of Understanding (MOU) with the DOI regarding wolf management expired in March 2010. Idaho's Republican Gov. Butch Otter began negotiations for a new MOU. After permission for the conservation hunt was denied, the governor terminated the state's participation in wolf management. State officials were ordered not to arrest poachers, investigate illegal wolf kills, monitor the state wolf population, or investigate livestock predation. Governor Otter stated, "everything the (federal government) has promised us, they've not kept. . . . It's time to draw the line somewhere."[85]

In February 2011, prior to approval for the Bitterroot hunt, Montana's Democratic Gov. Brian Schweitzer declared rebellion. The governor urged landowners in northern Montana, where wolves are an endangered species, to kill wolves harassing livestock, which is similar to the §10(j) rule in effect in southern Montana, where wolves are a threatened species. Hunters were also encouraged to kill wolves threatening elk herds in the Bitterroot area. Governor Schweitzer defended this illegal exhortation, stating he was "going to take additional necessary steps to protect the interests of Montana's livestock producers and hunters to the extent that I can within my authorities as governor."[86] Several days later, the governor backtracked,[87] but the spirit for rebellion among Republicans in the Montana Legislature was ignited. The Montana House passed a symbolic bill to nullify the ESA by a vote of 61-39.[88] The House also passed a resolution urging removal of ESA protections from the wolf by 99-1.

The spirit of rebellion spread to Idaho. In April 2011, the Idaho Legislature enacted a bill that grants the governor the power to declare a wolf emergency in the state because "the introduction of the Canadian gray wolves . . . [has] caused and continue[s] to threaten vast devastation of Idaho's social culture, economy and natural resources."[89] The emergency can be triggered by potential wolf conflict with humans, livestock, and big game, particularly if there are more than 100 wolves in the state. Such an emergency will end when the wolf is delisted statewide or the threat subsides.

IV. Congress Responds

The NRM wolf controversy moved to Congress. The courts, executive agencies, and Congress are involved in a dynamic relationship regarding public policy. Positive political theory posits that branches of government act as rational actors and compete with each other regarding policy preferences.[90] Congress reacts to judicial decisions. Early studies demonstrated congressional reluctance to intrude on judicial independence.[91] Recent studies show that Congress is aware of judicial decisions, devotes significant time to analyzing their policy implications, and frequently overrides statutory interpretations. Studies stress the importance of political factors in congressional reversals of judicial statutory decisions.[92]

Following the 2010 Montana decision, bills were introduced by western senators and congressmen that delisted the wolf in Idano and Montana, but retained protection in the remainder of the NRM DPS; delisted the wolf in the NRM DPS, except in Wyoming; and delisted the wolf nationally.[93] The bills arrived late in the session. No action

79. L. David Mech, *Managing Minnesota's Recovered Wolves*, 72 J. Wildlife Mgmt. 89 (2001). L.G. Adams et al., *Population Dynamics and Harvest Characteristics of Wolves in the Central Brooks Range, Alaska*, 170 Wildlife Monographs 1 (2008).
80. Scott Creel & Jay Rotella, *Meta-Analysis of Relationships Between Human Offtake, Total Mortality and Population Dynamics of Gray Wolves*, PLoS ONE (Sept. 2010); *see also* Dennis L. Murray et al., *Death From Anthropogenic Causes Is Partially Compensatory in Recovering Wolf Populations*, 143 Biological Conservation 2514 (2010).
81. Matt Gouras & Matthew Brown, *Feds Deny Montana's Wolf Hunt Request*, Lewiston Morning News (Oct. 8, 2010).
82. Congressional Documents and Publications, Tester Pushes Interior to Allow Montana Wolf Hunt (Jan. 26, 2011).
83. 50 C.F.R. §17.84 (n). Prior to approval, the FWS must find that the proposal is scientifically based, will not contribute to reducing the wolf population in the state below 20 breeding pairs and 200 wolves, and will not impede wolf recovery.
84. DOI Documents and Publications, FWS Publishes Draft Environmental Assessment of Idaho's Request to Manage Gray Wolves in Lolo Elk Management Zone (Feb. 10, 2011). Matthew Brown, *Feds Give Early Approval to Wolf Kills in Idaho*, Assoc. Press State & Local Wire, Feb. 11, 2011. U.S. Fed News, FWS Issues Notice About Availability of Draft Environmental Assessment of Montana Dept. Fish, Wildlife, and Parks Proposal (Mar. 30, 2011). States News Service, Governor Schweitzer Statement on Draft EIS (Mar. 28, 2011).
85. Becky Kramer & Betsy Z. Russell, *Idaho Pulling Back on Wolves,* Spokesman Rev. (Spokane, Wash.), Oct. 19, 2010.
86. State News Service, *Governor Notifies Interior of New Wolf Management Directives* (Feb. 16, 2011).
87. Matthew Brown, *Montana Isn't Planning Any Big Wolf Kills*, Lewiston Morning Trib., Feb. 19, 2011.
88. Matt Gouras, *Montana Eyes Nullification of the ESA*, Lewiston Morning Trib., Feb. 20, 2011.
89. Idaho House of Representatives, House Bill No. 343. Katherine Wutz, *A Day of Reckoning*, Idaho Mountain Express, Apr. 8, 2011. Ben Botkin, *Idaho Prepares for Renewed Hunts*, Times-News (Twin Falls), Apr. 16, 2011.
90. Daniel Farber & Philip Frickey, *Foreward: Positive Political Theory in the Nineties*, 80 Geo. L.J. 457, 458-63 (1992).
91. Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. Pub. L. 377 (1965).
92. William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991). James L. Walker & Michael E. Solomine, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 Temple L. Rev. 425 (1992).
93. H.R. 6028, S. 3825, S. 3919, S. 3864 (111th Cong, 2d Sess.). Eve Byron, *Wolf Management Hot Topic in D.C.*, Indep. Rec. (Helena, Mont.), Dec. 3,

was taken in the Democratic U.S. House of Representatives, but there was an effort by Republicans to move the national delisting bill in the Democratic U.S. Senate by unanimous consent. Sen. Ben Cardin (D-Md.) objected, so the bill died.[94]

Wolf opponents renewed their efforts in 2011. Similar bills were introduced with bipartisan support, but there was a major change in Congress.[95] Republicans gained the majority in the House, and the Democratic majority in the Senate was reduced.

Wolf opponents also pursued another tactic. A provision reviving the 2009 regulation and precluding its judicial review was attached to the CR to keep government funded through FY 2011. The provision was included in both the House-passed and proposed Senate version of the CR.[96] An effort by Rep. Cynthia Lummis (R-Wyo.) to include Wyoming was defeated on the basis that it constituted a substantive change in legislation not permitted in an appropriation measure. This indicated congressional skepticism regarding Wyoming's plan.[97]

Policy creation through budget riders is flawed. There are no careful deliberations. Committees with subject matter expertise are ignored. There are no hearings, amendments, or debates. The leadership is vested with extraordinary power. Policy riders can create conflict within and between both houses in Congress. The riders interfere with executive policy implementation. Finally, policy riders detract from funding issues.[98]

V. Proposed Settlement

Fear of congressional action generated a settlement proposal, which provided for the following: (1) ESA protections from wolves in Idaho and Montana would be removed; (2) Negotiations with Wyoming would continue, and a new delisting regulation would be promulgated; (3) ESA protections for wolves in Oregon, Utah, and Washington would be retained; (4) The DOI would withdraw the 2007 Solicitor's Memo on the meaning of "significant portion of the range"; (5) A scientific panel would reexamine recovery goals according to the best available science; (6) The DOI would monitor the wolves in the region for four years; and (7) Environmental groups promised that there would be no relisting proposals in the region until 2013, and no further litigation until 2016. Some of the environmental plaintiffs felt this was the best of the bad alternatives.[99]

Ten of the environmental plaintiffs agreed to the settlement, but four were opposed.[100] Earthjustice, which represented the environmental plaintiffs, was forced to withdraw from the suit because the split created a conflict of interest.[101]

The settling parties wanted Judge Molloy to stay his earlier decision and accept the settlement. On April 9, 2011, the court rejected the proposal. The court noted that it must follow the law, not policy, and stressed the need to protect the interests of all parties in the litigation. The court determined that the proposed settlement will place wolves in Idaho and Montana at greater risk. The court cannot use its equitable powers to allow a substantive violation of the ESA. The court noted that the settling parties assert that there will be adequate protection for the wolf under state plans. However, these parties previously argued that state management was inadequate, the numbers were too low for delisting, and the DPS could not be subdivided. If the stay is granted, many of these issues will not be resolved. The court was particularly concerned that the proposal will adversely affect the interests of nonsettling parties. The court found the withdrawal of the Solicitor's Memo was not significant because its conclusions are erroneous. Balancing the equities, the court refused to stay its earlier order.[102]

VI. Congressional Finale

After Judge Molloy rejected the proposed settlement, Congress agreed to language proposed by Senator Tester and Rep. Mike Simpson (R-Idaho) in the final CR that delisted the wolf in the NRM except Wyoming and precluded its judicial review. The FWS was also ordered to reconsider the Wyoming management plan in light of Judge Johnson's decision and to determine if a statewide trophy game designation is warranted.[103]

2010.

94. Laura Lundquist, *Utah Bill to Delist the Wolves Fails in Senate*, Times-News (Twin Falls, Idaho), Dec. 22, 2010.
95. Eric Baker, *Idaho Congressmen Co-Sponsor Bills to Change Status of Wolves*, Lewiston Morning Trib., Jan. 27, 2011.
96. Congressional Documents and Publications, Rehberg Statement on Inclusion of Wolf Language in House Continuing Resolution (Feb. 14, 2011). State News Service, *Senate Includes Delisting Bill in Must Pass Funding Package* (Mar. 4, 2011).
97. *House Denies Bid to Lift Wolf Protections in Wyo.*, Assoc. Press State & Local Wire, Feb. 17, 2011. Rejected proposals are relevant as "direct evidence that Congress considered the issue and agreed not to adopt a specified policy." William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 638-39 (1990).
98. Neil E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 Duke L.J. 456, 460-65; Neil E. Devins, *Appropriations Redux*, 1988 Duke L.J. 389.
99. Press Release, DOI, Interior Announces Proposed Settlement of Gray Wolf Lawsuit (Mar. 18, 2011). Kiernan Suckling, Center for Biological Diversity, stated
> given the virtual certainty of Congress permanently stripping protection for all Northern Rockies and northwest wolves, barring litigation to challenge the delisting and establishing no scientific baselines for recovery, we believe this agreement is necessary to preserve long term recovery potential and head off a terrible precedent that would invite conservative congresspersons to push legislation to delist endangered species all over the country. It was a difficult and heart-wrenching decision, but one that we feel is in the best course in this very difficult and dangerous situation.

CBD, Newsletter (Mar. 24, 2011).
100. The 10 favoring settlement were Cascadia Wildlands, CBD, Defenders, Greater Yellowstone Coalition, Hells Canyon Preservation Council, Jackson Hole Conservation Alliance, NRDC, Oregon Wild, Sierra Club, and Wildlands Network. The four opposed to settlement were Alliance for the Wild Rockies, Western Watershed Project, Friends of the Clearwater, and the Humane Society of the United States.
101. *Deal Reached to Lift Protections in 2 States,* Assoc. Press Online, Mar. 18, 2011.
102. Defenders v. Salazar, CV 09-77-M-DWM, CV 09-82-M-DWM (Apr. 9, 2011).
103. Eve Byron, *Budget Rider Will Delist Wolves*, Indep. Rec. (Helena, Mont.), Apr. 15, 2011. On April 15, 2011, President Obama signed the appro-

There were various reactions by participants in the campaign. Senator Tester, who is in a tough reelection battle against Rep. Denny Rehberg (R-Mont.), who is even more anti-wolf, stated: "we didn't amend the ESA. We asked that a recovered species—a species that FWS projected at 300 when it was reintroduced and now is 1,700, be taken off and managed just how we manage elk and mule deer and everything else." Representative Lummis stated "this language removes obstacles that would have otherwise hindered discussions on the status of the fully recovered gray wolf in Wyoming. . . . I am confident that we are closer than ever to realizing the full delisting."[104] Environmental groups acknowledged that Senator Tester was given "a powerful political pelt to hang on his wall," but declared their intention to focus on state legislatures where there will be great pressure to kill wolves.[105] Montana has proposed a public hunt of 220 wolves in the fall, which constitutes a 40% reduction in its wolf population. Idaho has decided not to establish any quota for the fall wolf hunt.[106]

VII. Conclusion

Wolf recovery in the NRM has been successful. There are currently 1,651 wolves in 244 packs, and 111 breeding pairs in the region,[107] which are functioning as a metapopulation. The wolf is providing ecological benefits to the region. The wolf, a summit predator, sustains biological diversity and maintains ecosystem harmony. The wolf removes diseased animals; culls the genetically inferior animals; stimulates prey productivity; and controls the ungulate population. The benefits of wolf restoration are spread across the ecosystem. Wolf kills provide sustenance for the food chain. The wolf maintains balance among predators, particularly by limiting the coyote. The wolf helps plant regeneration and diversity by discouraging profligate grazing by its prey.[108]

The federal courts have been instrumental to wolf recovery in the NRM, turning back challenges by the livestock industry, hunters, and western states. The federal courts have supported the reintroduction of the wolf into the NRM; rejected the Bush Administration's attempt to downlist the wolf across much of its historic region; and prevented the delisting of wolves in the region until Wyoming developed an adequate management plan.[109]

Congress intervened and shifted the balance of power to the wolf's opponents. Congress enacted a rider delisting the wolf in the NRM. This is contrary to federal court decisions that the DPS can not be subdivided. Congress overruled the FWS rejection of the Wyoming wolf management plan by supporting the decision of the Wyoming federal district court. The rider establishes a bad precedent. This is the first time Congress delisted a specific species from ESA protection. It may encourage further congressional exemptions of species from ESA protections. It undermines the ESA because this proposal is not based on science, but on politics. It may endanger wolf recovery in the NRM if wolf populations are driven down to 150 wolves per state as a result of wolf hysteria. There is no protection for the nascent recovering wolf populations in Washington,[110] Oregon,[111] and Utah,[112] which do not have federally approved state plans.

Finally, preventing judicial review of the resurrected flawed regulation rocks the foundation of the modern administrative state, which assumes judicial review of administrative actions.[113] In the modern administrative state, Congress enacts laws that delegate authority to executive agencies to implement law through rules and regulations. Courts review agency decisions to ensure compliance with the statutory mandates. The courts are "in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance." Agencies and courts constitute "a partnership in furtherance of the public interest."[114] Judicial oversight of administrative

priation bill that will delist the NRM wolves. 76 Fed. Reg. 25590 (May 5, 2011).

104. *Wolf Delisting Excludes Wyoming*, Billings Gazette, Apr. 12, 2011.
105. Phil Taylor, *Budget's Wolf Delisting Opens Pandora's Box*, N.Y. Times, Apr. 13, 2011. Richard Reeder, *Wolf Deal May Be a Negative for Wyoming*, Cody Enterprise, Apr. 6, 2011.
106. Becky Kramer, *Rules on Idaho Wolf Hunt Include No Statewide Quota,* Spokesman Rev., July 9, 2011.
107. FWS, Rocky Mountain Wolf Recovery 2010 Interagency Annual Report, http://westerngraywolf.fws.gov/annualreports.htm.
108. James Terough et al., *The Role of Top Carnivores in Regulating Terrestrial Ecosystems, in* Continental Conservation: Scientfic Foundations of Regional Reserve Networks 39-64 (Michael E. Soule & John Terough eds., 1999). Mark Hebblewhite et al., *Human Activity Mediates a Trophic Cascade Caused by Wolves*, 86 Ecology 2135 (2005).
109. The Administration has agreed to a plan that is similar to rejected proposals. Ben Neary, *Wyoming, Feds Announce Plan for Delisting Wolves*, Assoc. Press Online, Aug. 4, 2011. Representative Lummis wants the deal to be exempt from judicial review. *Wyoming Congresswoman Wants Wolf Deal Free From Court Review,* Lewiston Morning Trib., July 7, 2011. The House Appropriation Committee passed the FY 2012 Interior Appropriation Bill that included a provision precluding judicial review of any effort to delist wolves in Wyoming. *Interior Appropriations Bill Marked-Up,* Congressional Documents (July 13, 2011).
110. Wolves in the western two-thirds of Washington are federally protected as an endangered species. At least two wolf packs have produced pups in the state. The proposed state management plan will permit 15 breeding pairs throughout the state. When delisted, the wolf will remain an endangered species under state law until statewide conservation objectives are met. 74 Fed. Reg. at 15172. The proposed plan has been criticized for allowing too many wolves and providing inadequate protection for livestock and wildlife. Eric Barker, *Wolf Plan Called Short-Sighted,* Lewiston Morning Trib., June 30, 2011.
111. Wolves are classified as an endangered species under the Oregon ESA. The Oregon Fish and Wildlife Commission proposed a wolf management plan in 2005. Once federally delisted, the state will consider delisting when there are four breeding pairs for three consecutive years. After delisting, the wolf will be considered a "special status mammal" under state law. There has been no final action on the proposal. *Id.* at 15172-73.
112. In 2005, the Utah Wildlife Board developed a state management plan to permit two breeding pairs in the state. *Id.* at 15173-74. In 2010, Utah enacted SB 36, which prevents the establishment of packs in areas where the wolf is delisted, unless the entire state is delisted. After statewide delisting, the state plan will be activated and two breeding pairs will be allowed. Kirk Robinson, *Why Must Utah Be Kept Free of Wolves?,* Salt Lake Trib., Feb. 4, 2010. Dan Weist, *Gray Wolf Bill Angers Advocates,* Standard-Examiner (Utah), Oct. 20, 2010.
113. Louis Jaffe stated, "the availability of judicial review is the necessary condition . . . of a system of administrative power which purports to be legitimate or legally valid." Louis Jaffe, Judicial Control of Administrative Action 325 (1965).
114. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 133 U. Pa. L. Rev. 509, 511-12, citing Greater Boston Television v. FCC, 444 F.2d 841, 850-51 (D.C. Cir. 1970).

action ensures that "important legislative purposes, heralded in the halls of Congress are not lost or misdirected in the vast hallways of the federal bureaucracy."[115] Congress undermined the partnership by removing the courts from the process. Precluding judicial review of the 2009 executive regulation threatens the separation of powers and checks and balances that are fundamental to the modern administrative state.[116]

115. Calvert's Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

116. Environmental groups such as the CBD, Alliance for Wild Rockies, Friends of Clearwater, and Wildlife Guardians have challenged the delisting rider as a violation of separation of powers for interfering with a pending suit. *Lawsuits Challenge New Wolf Rules in N. Rockies*, Assoc. Press Online, May 5, 2011. Judge Molloy reluctantly upheld the constitutionality of the rider, but the environmental plaintiffs have appealed to the Ninth Circuit. Press Release, CBD, Appeal Challenges Congressional Rider That Stripped Wolves of Protection (Aug. 11, 2011).