

ARTICLES

Humane Society v. Jewell: The Court Cries Wolf

by Edward A. Fitzgerald

The author is a Professor of Political
Science at Wright State University.

Summary

In *Humane Society of the United States v. Jewell*, a federal district court invalidated the Endangered Species Act (ESA) delisting of wolves in the western Great Lakes (WGL) Distinct Population Segment. This decision culminated a long history of litigation over wolves in the WGL region, and has generated a political backlash, with congressional attempts to delist wolves and to weaken the ESA itself. The author argues that the *Jewell* court's analysis is erroneous on several central legal issues. As a policy matter, delisting the WGL wolves and returning them to state control should increase social tolerance of wolves, which is key to the long-term survival of the wolf.

I. Introduction

In December 2011, the U.S. Fish and Wildlife Service (FWS), acting pursuant to its authority under the Endangered Species Act (ESA),¹ delisted wolves in the agency's designated western Great Lakes (WGL) Distinct Population Segment (DPS).² Environmental groups brought suit.

Three years later in December 2014, the U.S. District Court for the District of Columbia invalidated the delisting in *Humane Society of the United States v. Jewell*.³ The court determined that FWS cannot simultaneously carve out and delist the WGL DPS from the larger national listing of the gray wolf as an endangered and threatened species. Alternatively, the court held that even if the WGL DPS can be isolated from the larger national listing, the WGL DPS is still deficient because FWS is not permitted to narrowly focus on the significant portion of the WGL DPS, but instead must examine the gray wolf's status across a significant portion of the continental United States.

The court's decision generated a political backlash. Congressional bills have been introduced to remove ESA protections from wolves in the WGL and Wyoming and preclude judicial review of the issue. There are also efforts in the U.S. Congress to weaken the ESA itself. This Article will review the history of the WGL wolves, analyze the court's decision, and examine the recent congressional responses.

II. History

The recovery of the wolf in the WGL region is truly "an endangered species success story."⁴ The gray wolf at one time occupied most of the continental United States.

1. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18. See 16 U.S.C. §1532(15); 50 C.F.R. §402.01(a), (b).
2. 76 Fed. Reg. 53379 (Aug. 26, 2011). In 1996, FWS and the National Marine Fisheries Service (NMFS) adopted a joint policy for purposes of listing, reclassifying, and delisting vertebrate species under the ESA. 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 habits, conservation status, or regulatory mechanisms exist that are significant in light of sect. 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.
3. *Humane Soc'y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, 44 ELR 20274 (D.D.C. Dec. 19, 2014).
4. See RECOVERY OF GRAY WOLVES IN THE GREAT LAKES REGION OF THE U.S.: AN ENDANGERED SPECIES SUCCESS STORY (Adrian P. Wydevan et al. eds., 2009) [hereinafter RECOVERY OF GRAY WOLVES].

Expansion of human settlement, the move westward, and growth of agriculture and livestock industries, trapping and hunting, and federal and state predator control led to the near-extirpation of the wolf. By the 1970s, the gray wolf had been extirpated from more than 95% of its historic range. The only remaining substantial wolf population was located in Minnesota.

Following the enactment of the ESA in 1973, various subspecies of the gray wolf were granted protection: the Northern Rocky Mountain (NRM) wolf in 1973, the eastern timber wolf in 1974, the Mexican gray wolf in 1976, and the Texas gray wolf in 1976.⁵ In 1978, FWS moved away from subspecies protection and listed the gray wolf as an endangered species throughout the continental United States, except Minnesota, where the wolf was downlisted to a threatened species.⁶

Nonetheless, FWS continued to recognize the importance of subspecies distinctions, and recovery plans and management decisions focused on subspecies. FWS completed a recovery plan for the eastern timber wolf in 1978, revised in 1992. (A national recovery plan was contemplated in 1994, but was abandoned.) The Eastern Recovery Plan covered a geographic area stretching from Minnesota east to Maine and south to Florida. The plan contained two listing criteria, which included at least two populations within the continental United States that met the following conditions:

- (1) the Minnesota population must be stable or growing, and its continued survival must be assured, and (2) a second population outside of Minnesota and Isle Royale must be reestablished, having at least 100 wolves in late winter if located within 100 miles of the Minnesota wolf population, or having at least 200 wolves if located outside that distance.⁷

Under the plan, wolves in Michigan and Wisconsin would be downlisted if the population within each state remained above 80 wolves for three consecutive years. The gray wolf prospered in the region and exceeded recovery goals. Gray wolves from Minnesota migrated to northern Wisconsin and northern Michigan to form a Great Lakes metapopulation. A few gray wolves also dispersed to Illinois, Missouri, and North and South Dakota.

In light of this success, the Clinton Administration in 2000 proposed establishing four gray wolf DPSs in the WGL, Northeast, West, and Southwest, and downlisting the gray wolf from an endangered species to a threatened

species throughout most of its historic range.⁸ The Bush Administration in 2003 established three DPSs in the East, West, and Southwest, and downlisted the wolves in the eastern and western DPSs.⁹ As a result, the wolves in the WGL region, specifically those in Michigan and Wisconsin, were reclassified as a threatened species.

The conservation organization Defenders of Wildlife brought suit challenging the downlisting across the eastern and western DPSs. In 2005, the U.S. District Court for the District of Oregon, in *Defenders of Wildlife v. Secretary of the Interior*, rejected the U.S. Department of the Interior's (DOI's) proposal. The court held that the Secretary's interpretation of "significant portion" of the gray wolf range was contrary to the ESA and case law, and that the Secretary's implementation of the DPS policy violated DOI regulations. Because the Secretary's analysis was limited to the wolf's current range, the department's conclusions regarding the five downlisting factors in the ESA were invalid, the court held.¹⁰

After this decision, the wolves in the Great Lakes region outside of Minnesota returned to endangered species status. In February 2007, FWS published the final rule simultaneously creating and delisting the WGL DPS, which included the wolves in all of Michigan, Minnesota, and Wisconsin; the eastern half of North and South Dakota; the northern half of Iowa; the northern portions of Illinois and Indiana; and the northwest portion of Ohio.¹¹ The Humane Society of the United States (a nongovernmental organization (NGO)), representing environmental groups, brought suit, asserting that FWS misconstrued the provision of the ESA that authorized the listing and delisting of species.

The Humane Society contended that Congress created the DPS designation to allow for the protection of struggling subpopulations of vertebrate fish and wildlife species that did not warrant a national endangered species designation. The Humane Society acknowledged that FWS can reclassify and delist the DPS after recovery, but argued that it cannot simultaneously designate and delist the DPS; a DPS must first be designated before it can be delisted. Neither the ESA nor DPS policy allows FWS to carve out the DPS from a species-level designation for the sole purpose

5. 38 Fed. Reg. 14678 (June 4, 1973); 39 Fed. Reg. 1158 (Jan. 4, 1974); 41 Fed. Reg. 17736 (Apr. 28, 1976); 41 Fed. Reg. 24062 (June 14, 1976).

6. 43 Fed. Reg. 9607 (Mar. 9, 1978).

7. U.S. FWS, RECOVERY PLAN FOR THE EASTERN TIMBER WOLF 4 (rev. 1992), available at http://www.biologicaldiversity.org/species/mammals/Great_Lakes_gray_wolf/pdfs/1992RecoveryPlan.pdf.

8. 65 Fed. Reg. 43450 (July 13, 2000).

9. 68 Fed. Reg. 15804 (Apr. 1, 2003).

10. *Defenders of Wildlife v. Secretary of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005). See Edward A. Fitzgerald, *Dysfunctional Downlisting Defeated: DOW v. SOI*, 34 B.C. ENVTL. AFF. L. REV. 37 (2007). To list and delist, the Secretary, utilizing the best available 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) Over utilization 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. 50 C.F.R. §424.11(d).

11. 72 Fed. Reg. 6052 (Feb. 8, 2007).

of delisting it. FWS argued that the definition of “species,” which includes the DPS, authorized it to designate and list struggling populations of unlisted species and healthy subpopulations of listed species without delisting the species as a whole.

In September 2008, the U.S. District Court for the District of Columbia, in *Humane Society of the United States v. Kempthorne*, found the ESA ambiguous on this point and therefore refused to accord any deference to FWS’ interpretation. The court remanded the issue to FWS to clarify the ambiguity.¹² Six months after the decision, FWS published a new final rule, but without following notice-and-comment rulemaking procedures.¹³ FWS merely added a section to the prior 2007 rule, entitled “Issues on Remand,” which offered further explanation of its authority to utilize the DPS designation to delist. After this 2009 rule was challenged, FWS vacated the 2008 rule and restored federal protection for the WGL wolves.¹⁴

On May 5, 2011, FWS published a proposed rule delisting the WGL DPS,¹⁵ followed by a final rule on December 28, 2011.¹⁶ The final rule differed from the proposed rule in two respects: First, the final rule reversed the agency’s initial view that eastern wolves were a distinct species because that view represented “neither a scientific consensus nor the majority opinion of researchers on the taxonomy of wolves.” FWS continued to recognize the gray wolf, *canis lupus*, as the only species that occupied the WGL. Second, rather than retracting the proposed delisting of the gray wolf in the 29 eastern states, FWS announced that it would separate and delist the WGL population. Further decision on the status of remaining eastern wolves would be made at a later date.

The Humane Society again brought suit.¹⁷ On December 29, 2014, the U.S. District Court for the District of Columbia, following its earlier decision, found that the DPS designation cannot be used to simultaneously list and delist a species; moreover, even if the DPS designation could be utilized, FWS could not narrowly focus on the significant portion of the WGL DPS, but must examine the gray wolf’s status across a significant portion of the continental United States. The court also found that FWS failed to adequately analyze the risk of disease and predation to the wolf population in the WGL DPS; that the taxonomic uncertainty of the wolf species occupying the WGL precluded its delisting; and, finally, that state management plans were inadequate. In this author’s view, most of the court’s findings were dubious, as detailed below.

III. Simultaneous Listing and Delisting of the DPS

The federal court held that the status of the species, sub-species, and DPS is determined by the initial listing. FWS can only use the DPS designation to list, not to delist: FWS cannot decrease ESA protection from species/subspecies listing via a DPS designation. The DPS designation is designed solely to provide increased federal protection for a discrete and significant population that is endangered or threatened; it avoids the need for a broader taxonomic listing and federal interference with state management. The court determined that since the gray wolf was listed as an endangered species across most of the continental United States, its status must be assessed in all or a significant portion of this historic range. FWS cannot restrict its analysis to the WGL DPS.¹⁸

A. Standard of Review

The Secretary’s statutory authority to simultaneously list and delist a DPS presents a legal question. The *Humane Society v. Jewell* court applied the U.S. Supreme Court’s two-step *Chevron* process regarding judicial review of an agency’s legal interpretation.¹⁹ Justice John Paul Stevens, who authored the *Chevron* opinion, later declared that a “pure question of statutory construction is for the courts to decide [by] employing traditional tools of statutory construction,”²⁰ which include analysis of the text, congressional intent, and the purposes of the statute.

B. Text

The court in *Humane Society v. Jewell* found that the text and structure of the ESA did not clearly support FWS’ conclusion that a DPS can simultaneously be established and delisted. The court determined that the mandatory five-year review of a species’ status pursuant to §4(c)(2) (B) indicates that the species must be listed before being delisted, and its status can only be changed at that later time. Further, said the court, the restriction of DPS designations to vertebrate species intimates that the species must be listed prior to delisting.²¹

In my view, however, the court’s decision is not consistent with the statutory language. The text indicates that a DPS designation can be carved out of a larger listing. ESA §4(a) requires the Secretary by regulation to “determine whether any species is an endangered species or a threatened species because of any of” the five listed factors.²² The same factors are utilized for reclassification and delisting.²³

12. *Humane Soc’y of U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 20-23, 38 ELR 20259 (D.D.C. 2008). See Edward A. Fitzgerald, DOW v. Salazar: *Delisting the Children of the Night in the Northern Rocky Mountains*, 31 PUB. L. & RES. L. REV. 1, 25-38 (2010).

13. 74 Fed. Reg. 15070 (Apr. 2, 2009).

14. 74 Fed. Reg. 47483 (Sept. 16, 2009).

15. 76 Fed. Reg. 26086 (May 5, 2011).

16. 76 Fed. Reg. 81666 (Dec. 28, 2011).

17. *Humane Soc’y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **76-79, 44 ELR 20274 (D.D.C. Dec. 19, 2014).

18. *Id.* at **101-24.

19. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984).

20. *INS v. Cardozo-Forseca*, 480 U.S. 421, 447 (1987).

21. *Humane Soc’y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **104-24.

22. 16 U.S.C. §1533(a).

23. *Id.* §1533(c).

Species are defined under §3(16) as species, subspecies, and DPS.²⁴ Species designation thus encompasses the DPS. Subsection (c)(1) instructs the Secretaries of the Interior and Commerce Departments to make lists of all endangered and threatened species, which can be revised periodically depending on the species' conservation status.²⁵ Subsection (c)(2) requires the Secretary of the Interior to "construct, at least once every five years, a review of all species included in the list which is published pursuant to paragraph 1."²⁶

The statutory text indicates that FWS can simultaneously list and delist a DPS for several reasons. First, the Secretary has discretion to evaluate the species' status according to the best scientific evidence at any time, but is required to do so at least every five years. There are no preconditions or time restrictions regarding the revision of a species' status in subsection (c)(1). Subsection (c)(2) does not restrict subsection (c)(1). Subsection (c)(2) requires the Secretary to review the status of a species on the list "at least once every five years," but does not preclude an earlier reexamination. Subsection (c)(1) is not linked to (c)(2).

Second, the DPS does not have to be separately listed prior to delisting because it is already included in the initial listing. The DPS is just a subset of the initial listing. FWS regulations declare that "the listing of species also includes all lower taxonomic listings."²⁷

Third, the DPS designation is restricted to vertebrate species, but this does not indicate that listing is a necessary precondition for delisting. FWS asserted that the DPS designation was limited "to those species that [it] deemed most valuable, such as mammals, birds, and fish."²⁸ One commentator suggested that the limitation indicated that "Congress was not willing to incur the costs of protecting DPSs of insects and plant species, but was willing to incur the costs of protecting DPS of keystone species like the grizzly bear and gray wolf."²⁹ Even the federal district court in the 2008 *Humane Society v. Kempthorne* case hypothesized that plants and insects may have been excluded from the DPS designation because their identification and management would be unwieldy.³⁰

The reclassification of wolves in Minnesota in 1978 demonstrates the utility of subsection (c)(1). Prior to the inclusion of DPS language, subsection (c)(1) alone was utilized to reclassify the Minnesota wolf population to a threatened species in 1978. In 1974, four subspecies of the gray wolf were listed as endangered species, one of which was the eastern timber wolf. In October 1974, Minnesota asked the Secretary to remove the Minnesota wolves from the endangered species list. In March 1978, DOI abandoned its focus

on subspecies designations, which were out of date, and reclassified the Minnesota wolves from an endangered to a threatened species. DOI simply considered gray wolves in the United States a species and the Minnesota wolves a separate species, then analyzed the five factors of ESA §4(a) to support the reclassification of the Minnesota wolves.³¹ This demonstrates that the Secretary is not bound by the initial listing, but has the flexibility to downlist a DPS from a larger species listing for different treatment.

C. Legislative History

The *Humane Society v. Jewell* court found that legislative history did not clarify the statutory ambiguity. There were congressional statements during the ESA's enactment in 1973 indicating that the Secretary was granted discretion regarding the listing of endangered and threatened species. There were also congressional statements in 1978 indicating that the DPS designation could only be used for listing. The court determined that nothing in the legislative history was inconsistent with the position that the DPS had to be listed before being delisted.³²

Here again, the court's conclusion is questionable. The legislative history indicates that Congress explicitly provided for differential treatment of different populations of the same species depending on their conservation status.³³ History shows a narrowing of focus of ESA protections from species to subspecies to DPS. The Endangered Species Conservation Act of 1966 provided limited protection for certain species of fish and wildlife threatened with extinction.³⁴ There was no concern evinced for subspecies or populations. The Endangered Species Preservation Act of 1969 protected species and subspecies of wildlife threatened with worldwide extinction.³⁵ Congress was concerned with the narrow scope of these statutes. The ESA of 1973 protected endangered and threatened species throughout all or a significant portion of their ranges. Species were defined as "subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature."³⁶

There were statements in the U.S. Senate³⁷ and the U.S. House of Representatives³⁸ hearings preceding enactment of the ESA that indicated that different levels of protections for the same species were considered. Statements in the Senate hearings in 1973 continued to

24. *Id.* §1532(16).

25. *Id.* §1533(c)(1).

26. *Id.* §1533(c)(2).

27. 50 C.F.R. §17.11(g).

28. *Humane Soc'y of U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 17, 38 ELR 20259 (D.D.C. 2008).

29. Katherine M. Hausrath, *The Designation of DPS Under the ESA*, 80 CHIKENT L. REV. 449, 455-56 (2005).

30. *Kempthorne*, 579 F. Supp. 2d at 30-31.

31. 43 Fed. Reg. 9607 (Mar. 9, 1978).

32. *Humane Soc'y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **124-28, 44 ELR 20274 (D.D.C. Dec. 19, 2014).

33. MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF WILDLIFE LAW* 200 (3d ed. 1997).

34. Pub. L. No. 89-669, 80 Stat. 926 (1966).

35. Pub. L. No. 91-135, 83 Stat. 275 (1969).

36. Pub. L. No. 93-205, §3(11).

37. The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. on the Envt. of the S. Comm. on Commerce, 93d Cong. 109 (1972).

38. Predatory Mammals and Endangered Species: Hearings on H.R. 1311 and H.R. 13081 Before the Subcomm. on Fisheries of the H. Comm. on Merchant Marine and Fisheries, 92d Cong. 136 (1972).

emphasize differential treatment for the same species.³⁹ The differential treatment of the Minnesota wolf population was the specific subject of comment in the House debates in 1973.⁴⁰

The ESA Amendments of 1978 established the current definition for a species as including “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreed when mature.”⁴¹ The Conference Committee explained that the new definition included “distinct populations” of vertebrate fish or wildlife. At the same time, Congress rejected attempts to limit the definition to taxonomic species, which would have eliminated the possibility of listing subspecies and populations.⁴²

The ESA Amendments of 1979 did not change the definition, but the DPS listing was the subject of debate.⁴³ The U.S. Government Accountability Office (GAO) (denoted the U.S. General Accounting Office at the time) suggested that the DPS listing be terminated because it could “result in the listing of squirrels in a specific park, even though there is an abundance of squirrels in other parks in the same city, or elsewhere in the country.”⁴⁴ FWS and the National Marine Fisheries Service (NMFS) opposed GAO’s suggestion because “it would severely limit their ability to require the appropriate level of protection for a species based on its actual biological status.”⁴⁵ The Senate Committee on Environment and Public Works, rejecting the GAO proposal, declared that

there may be instances in which FWS should provide for different levels of protection for populations of the same species. For instance, the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world. Similarly, listing of populations may be necessary when the preponderance of evidence indicates that a species faces widespread threat, but conclusive data is available with regard to only certain populations. Nonetheless, the committee is aware of the greatest potential for abuse of its authority and expects the FWS to use the ability to list population sparingly and only when the biological evidence indicates that such action is warranted.⁴⁶

D. Purposes

The *Humane Society v. Jewell* court also held that the FWS interpretation was inconsistent with the statutory purposes: The DPS designation is designed solely to provide increased federal protection for a discrete and significant population, which is endangered or threatened. The court stated that the DPS designation avoids the need for a broader taxonomic listing and federal interference with state management.⁴⁷

To the contrary, carving a DPS from a larger species listing is consistent with ESA purposes. The ESA is designed to promote cooperative federalism. Section 2(a)(5) explains that

encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation’s international commitments and to better safeguarding, for the benefits of all citizens, the Nation’s heritage in fish, wildlife, and plants.⁴⁸

Section 6, entitled “Cooperation With the States,” instructs the Secretary to “cooperate to the maximum extent practicable with the States.”⁴⁹ Several senators described §6 as “perhaps the most important section” of the ESA and the statute’s “major backbone.”⁵⁰ Senate and House committees stressed that the ESA would not preempt state wildlife management and that federal/state cooperation was essential.⁵¹

Removing ESA protections from a recovered DPS will improve state cooperation in several ways. First, it rewards states that have actively cooperated with FWS to protect and conserve endangered species by returning management authority to states. State agencies can manage the species more effectively with laws and programs tailored to local circumstances. State agencies can provide the human resources for implementing plans and enforcing regulations. If affected states must wait for national delisting, they will lack any incentive to participate in local restoration efforts.

Second, removing healthy DPSs from the wider range of the species conserves scarce federal resources. ESA mandates—including the §7 consultation process, §9’s prohibition on private takings, and §10 incidental take permits—require federal funds and place significant regulatory burdens on state and local governments.

Third, removing healthy DPSs from the endangered species list allows the federal government to direct its funding toward species that are still in danger of extinction and require conservation efforts to improve their sta-

39. The Endangered Species Conservation Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on the Envt. of the S. Comm. on Commerce, 93d Cong. 60-62 (1973).

40. Endangered Species, Hearings on H.R. 37 Before the Subcomm. on Fisheries of the H. Comm. on Merchant Marine and Fisheries, 93d Cong. 327 (1973), 119 CONG. REC. 42912 (Dec. 2, 1973).

41. Pub. L. No. 93-632, §2(5), 92 Stat. 3751 (1978).

42. H.R. REP. NO. 95-1804 (1978). See A LEGISLATIVE HISTORY OF THE ESA OF 1973 1192, 1208 (Comm. Print 1973); Karl Gleaves et al., *The Meaning of “Species” Under the ESA*, 13 PUB. LAND L. REV. 25, 30-31 (1992).

43. Pub. L. No. 96-159, 93 Stat. 1225 (1979).

44. S. REP. NO. 96-151 (1979). A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980 (U.S. Government Printing Office 1982), at 1396-97.

45. *Id.* at 1397.

46. *Id.* at 1396-97; Gleaves et al., *supra* note 42, at 32-33.

47. *Humane Soc’y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **124-35, 44 ELR 20274 (D.D.C. Dec. 19, 2014).

48. 16 U.S.C. §1531(a)(5).

49. *Id.* §1535.

50. 139 CONG. REC. 25668, 25670 (1973).

51. H.R. REP. NO. 93-470 at 26 (Conf. Rep.), reprinted in Legislative History, *supra* note 44, at 450-51.

tus. Preventing the downlisting of a recovered DPS wastes resources and time that could be used more effectively.⁵²

E. Past Practice

FWS has reduced ESA protections from different populations of the same species.⁵³ In February 1985, FWS delisted the brown pelican in the southeastern United States, while it remained listed as endangered in the remainder of its range.⁵⁴ In June 1994, NMFS removed the eastern North Pacific population of gray whales from the list of endangered and threatened species, while retaining the North Pacific population listing as endangered.⁵⁵

FWS also utilized the DPS to downlist the status of portions of previously listed species. In July 2003, FWS established two DPS of the Columbia white-tailed deer—the Douglas County DPS and the Columbia River DPS. The Douglas County DPS was delisted, while the Columbia River DPS retained its legal status.⁵⁶ In March 2007, FWS identified the American crocodile in Florida as a DPS within the existing endangered listing and reclassified the Florida DPS from endangered to threatened.⁵⁷ In March 2007, FWS established and delisted the Greater Yellowstone Area DPS of grizzly bears within the existing grizzly bear listing in the lower 48 states.⁵⁸ The decision was later reversed, but not because of the DPS designation.

F. Other Judicial Decisions

Several federal courts have examined FWS' utilization of the DPS as a downlisting device for the wolf and found it proper. The Oregon federal district court in *Defenders of Wildlife v. Secretary of Interior* found the FWS' establishment of three DPS, which included the entire historic range of the gray wolf, and the downlisting of the eastern and western DPS, inconsistent with the ESA and DPS policy.⁵⁹ The court determined that the DPS was designed to encapsulate a population whose conservation status differed from other populations of the same species. The court stated that "if a distinct and significant population of an unlisted species is struggling while other populations are faring well, the FWS may identify the struggling population as a DPS and list it as endangered. Likewise, FWS can downlist a DPS if that discrete and significant population is no longer endangered."⁶⁰

The U.S. District Court for the District of Vermont in *National Wildlife Federation v. Norton* held that the estab-

lishment of an eastern DPS violated the ESA and DPS policy.⁶¹ The court held that the Secretary could establish a DPS when necessary for management flexibility to protect the species and its habitat from extinction while maintaining a national listing. FWS could not simply "lump together" the core population with a low to nonexistent population outside the core area and downlist or delist the entire area.⁶²

Another case found the use of the DPS designation improper. The U.S. District Court for the District of Oregon, in *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, rejected FWS' attempt to utilize DPS policy to avoid ESA requirements.⁶³ Initially, FWS determined that a national listing for the bull trout was warranted. FWS later changed its position and created five DPSs, but did not grant the bull trout a national listing. The court held that FWS' failure to list the bull trout nationally and explain its adoption of five DPSs, which decreased protection of the species, was arbitrary and capricious. The court noted that the DPS "is a proactive measure to prevent the need for listing a species over a larger range—not a tactic for subdividing a larger population that [FWS] already determined, on the same information, warrants listing throughout a larger range."⁶⁴ This case demonstrates that FWS cannot use the DPS designation to avoid national listing of species. FWS continues to retain endangered and threatened species status for the gray wolf except in the NRM DPS (excluding Wyoming).

G. Taxonomy

The *Humane Society v. Jewell* court held that FWS' determination that the WGL wolves are gray wolves undermines the delisting. In the proposed rule, FWS asserted that WGL wolves are a separate species, *canis lycaon*, which are present in 29 eastern states. If FWS adhered to this finding, the creation of the WGL DPS would be appropriate. FWS' final rule, however, declared that the WGL wolves are *canis lupus*, not *canis lycaon*. The court held that since the WGL wolves are *canis lupus*, FWS must assess their status in relation to the initial national listing; FWS could not carve out the DPS from the larger national listing.⁶⁵

Again, the court's decision was mistaken. The ESA requires FWS to employ the best available science.⁶⁶ In the proposed rule, FWS relied on an in-house study by Steven M. Chambers et al. that concluded WGL wolves are a separate species.⁶⁷ FWS' reliance on the study was criticized by legislators and scientists because it was not published in a scientific journal for peer review, but instead appeared in *North America Fauna*, an internal

52. U.S. DOI, Office of Solicitor, Memorandum to FWS Director: *U.S. Fish and Wildlife Service Authority Under Section 4(c)(1) of the Endangered Species Act to Revise Lists of Endangered and Threatened Species to "Reflect Recent Determinations,"* 16-19 (2008).

53. 74 Fed. Reg. 15070, 15129-30 (Apr. 2, 2009).

54. 50 Fed. Reg. 4938 (Feb. 4, 1985).

55. 59 Fed. Reg. 31094 (June 16, 1994).

56. 68 Fed. Reg. 43647 (July 24, 2003).

57. 71 Fed. Reg. 13027 (Mar. 20, 2007).

58. 72 Fed. Reg. 14865 (Mar. 29, 2007).

59. 354 F. Supp. 2d 1156 (D. Or. 2005).

60. *Id.* at 1170-71.

61. 386 F. Supp. 2d 557 (D. Vt. 2005).

62. *Id.* at 565-66.

63. 12 F. Supp. 2d 1121 (D. Or. 1997).

64. *Id.* at 1133.

65. Humane Soc'y of U.S. v. Jewell, 2014 U.S. Dist. LEXIS 175846, at **148-55, 44 ELR 20274 (D.D.C. Dec. 19, 2014).

66. 16 U.S.C. §1533(b)(1)(A).

67. Steven M. Chambers et al., *An Account of the Taxonomy of North American Wolves From Morphological Genetic Analysis*, 77 N. AM. FAUNA (Oct. 2012).

FWS publication that had been dormant for 20 years.⁶⁸ FWS abandoned this position in the final rule because it “represents neither a scientific consensus nor the majority opinion of researchers on the taxonomy of wolves as others continue to assert that eastern wolves are forms of gray wolf.”⁶⁹ In light of the ongoing debate, FWS returned to its long-held view that wolves in the WGL DPS are gray wolves.

The taxonomy of the wolf has been controversial. The key criteria employed for taxonomic distinctions are morphology and genetics. Experts often disagree, as manifested in the classification of WGL wolves.⁷⁰ The most recent genetic studies support the FWS position that the WGL wolves are *canis lupus*, not *canis lycaon*. A study conducted by Bridgett M. vonHoldt et al., utilizing a new system for genetic testing, examined the single nucleotide polymorphisms to investigate the genetic distinctiveness of the North American canids.⁷¹ The study concluded that wolves from the WGL region are a product of low-level hybridization between coyotes and *canis lupus* that likely occurred prior to the recent invasion of coyotes into the area, and found no evidence that *canis lycaon* exists as a distinct species. Further, WGL wolves are genetically distinct from other North American gray wolves and coyotes, but to what degree remains controversial.⁷² Other recent studies conclude that WGL wolves are a unique species, a hybrid of *canis lycaon* and *lupus*, that exists within the range of *canis lycaon*. FWS acknowledged this possibility.⁷³

If the WGL wolves are *canis lupus*, FWS can establish a DPS from the larger national listing, contrary to the court’s decision. If WGL wolves are a hybrid, which FWS admitted is possible, the WGL DPS of the hybrid species that was initially proposed would be appropriate, as conceded by the court. Under either taxonomic alternative, the creation of the WGL DPS would be appropriate.

FWS can make decisions in the face of scientific conflict. Because this is a controversial issue, the court should have deferred to FWS expertise, which is consistent with the best available science. The only problem is the fundamental difference between the proposed rule and the final rule. The Vermont federal district court in 2005 invalidated FWS’ creation of the eastern DPS in part on the ground that the proposed and final rules were so different that it deprived stakeholders of an adequate opportunity

to comment on the proposed regulation.⁷⁴ In this case, FWS took two sets of comments on the proposed delisting that included a discussion of the taxonomy of the WGL wolves, and will continue to study the issue. Contrary to the court’s finding, FWS did not act in an arbitrary and capricious manner.

On June 13, 2013, the Barack Obama Administration proposed delisting the wolf across much of the United States. For this position, FWS relied on the dubious Chambers study.⁷⁵ FWS’ changed position from the 2011 final regulation delisting the WGL DPS to the 2013 proposed national delisting was raised in the *Humane Society v. Jewell* litigation. FWS argued that the 2013 proposal postdates the 2011 rule, so the proposed rule cannot be considered because it is outside the administrative record. Since FWS relied on best available science in 2011, the proposed rule has no legal effect. FWS is still investigating wolf taxonomy.⁷⁶ Despite these assertions, FWS’ recent position in the WGL litigation undermines the basis of the 2013 proposal. FWS should bury the 2013 flawed proposal and quell any calls in Congress for its resurrection.

IV. The Adequacy of the WGL DPS

The *Humane Society v. Jewell* court held that even if the WGL DPS could be carved out of the larger national listing, the evidence did not warrant the WGL DPS delisting. FWS failed to explain why parts of the other six states were not a significant portion of the WGL DPS; why the threat of disease and predation did not pose a continuing threat to the WGL population; why the lack of state management programs in the other six states in the DPS did not pose a threat; and how unlimited killing in certain parts of Minnesota did not constitute a continued threat.⁷⁷

A. Standard of Review

The court examined the Secretary’s implementation of policy, which involves a mix of legal and policy questions. Generally, under *Chevron*, a court defers to agency expertise. Nevertheless, a reviewing court must perform a “thorough, probing, in-depth review” of agency action.⁷⁸ The “hard look doctrine” requires a court to examine 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.”⁷⁹

68. See Letter from Rep. Peter DeFazio to Interior Secretary Sally Jewell (Sept. 4, 2013) (on file with author); Letter from the American Society of Mammologists to Interior Secretary Sally Jewell (May 22, 2013) (on file with author).

69. 76 Fed. Reg. at 81669.

70. Holly Doremus, *Listing Decisions Under the ESA: Why Better Science Isn’t Always Better Policy*, 75 WASH. U. L.Q. 1029, 1087 (1997). STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE ESA 75 (1982).

71. Bridgett M. vonHoldt et al., *A Genome-Wide Perspective on the Evolutionary History of Enigmatic Wolf-Like Canids*, 21 GENOME RES. 1294 (2011).

72. *Id.*

73. 76 Fed. Reg. at 81668-69. See Ronald M. Nowak, *Taxonomy, Morphology, and Genetics of Wolves in the Great Lakes Region* 233, in RECOVERY OF GRAY WOLVES, *supra* note 4.

74. National Wildlife Fed’n v. Norton, 386 F. Supp. 2d 557, 561-62 (D. Vt. 2005).

75. 78 Fed. Reg. 35664 (June 13, 2013).

76. Federal Defendants’ Memorandum of Points and Authorities in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, at 37-41, *Humane Soc’y of U.S. v. Jewell*, No. 1:13-cv-00186-BAH (D.D.C. 2014).

77. *Humane Soc’y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **154-56, 44 ELR 20274 (D.D.C. Dec. 19, 2014).

78. National Ass’n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003).

79. Greater Boston TV Corp. v. Federal Commc’ns Comm’n, 444 F.2d 841, 850-51 (D.C. Cir. 1970).

B. Significant Portion of the Range

The court held that FWS did not adequately explain why other areas in the WGL DPS are not a significant portion of the wolves' range. The court found that FWS' narrow focus on the wolf's current range was inconsistent with the rulings of the U.S. Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. Norton*⁸⁰ (flat-tailed lizard case) and of the U.S. District Court for the District of Columbia in *Defenders of Wildlife v. Norton*⁸¹ (lynx case). FWS did not explain why areas in the other six states are not a significant portion of the wolf's range.⁸²

I. Analysis in *Humane Society v. Jewell*

Here too, the court's decision was mistaken. FWS did accurately determine that there was no significant portion of the wolf's range in the WGL DPS that can support additional wolf populations. The U.S. District Court for the District of Montana, in *Greater Yellowstone Coalition v. Servheen*,⁸³ rejected FWS' creation and delisting of the grizzly bear in the Greater Yellowstone Area (GYA) DPS, but did not question the use of the DPS. The plaintiffs argued that the FWS delisting must consider the historic range of grizzly bears across the United States, not just in the GYA, because the grizzly bear was still missing from 98-99% of its historic range. The federal court held that since the rule only dealt with the DPS, it "would be nonsensical to require the Service to consider the grizzly's historic range throughout the U.S."⁸⁴

To delineate the WGL DPS boundary, FWS considered the current distribution of wolves in the Midwest and the characteristic movements of those wolves and of wolves elsewhere. FWS examined best available scientific data on long-distance movement, including long-distance movements followed by return movements to the vicinity of the natal pack.⁸⁵

FWS concluded that suitable habitat for the WGL wolves can be determined by four factors: road density, human density, prey base, and size. An adequate prey base is an absolute requirement, but the white-tailed deer density is well above adequate levels in much of the WGL DPS. The only area of potential concern is Michigan's upper peninsula, where severe winter conditions cause deer to move away from some lakeshore areas, making otherwise suitable areas locally and seasonally unsuitable. Road density and human density frequently are highly correlated; therefore, road density is the best single predictor of habitat suitability. However, areas with high road density may still be suitable if the human density is very low. Finally, although the territory of individual wolf packs can be relatively small,

packs are not likely to persist as a viable population if they occupy a small isolated island of otherwise suitable habitat.

FWS concluded that Minnesota wolf management zones 1-4, Wisconsin wolf zones 1 and 2, and the Michigan upper peninsula contain a sufficient amount of suitable wolf habitat. Other areas within the DPS are unsuitable habitat or are potential habitat that is too small or too fragmented to be suitable for maintaining a viable wolf population.⁸⁶

No areas within the WGL DPS that can support wolves under the recovery plan criteria were identified.⁸⁷ There are, however, smaller areas of potential wolf habitat. The area principally cited for possible occupation is the northern portion of Michigan's lower peninsula. FWS found the northern part of the lower peninsula unsuitable because it is too small and fragmented to support a viable population. Wolves need 5,000 square miles of habitat, but there is only 3,900 square miles of suitable habitat in the northern lower peninsula; additionally, FWS determined that the road density was too high. Wolves thrive in areas where there is only 0.9 to 1.1 miles of road per square mile. Nevertheless, FWS acknowledged that several studies indicate that a persistent wolf population may develop as a result of occasional to frequent immigration of the upper peninsula wolves.⁸⁸

Peer reviewers were divided on the suitability of the northern lower peninsula. One reviewer stated that the state should allow wolves to move into habitat there; another reviewer agreed with FWS that currently unoccupied habitat in the northern lower peninsula is not a significant portion of the range.⁸⁹

Another area earlier identified as potential wolf habitat within the proposed WGL DPS is the Turtle Mountain region that straddles the international border in north-central North Dakota. Road densities within the region are below the thresholds believed to limit colonization by wolves. This habitat area, however, only constitutes 579 square miles, with approximately 394 square miles in North Dakota and 185 square miles in Manitoba—far less than the recommendation in the recovery plan of the minimum area of habitat necessary to support a wolf population. Further, the Manitoba portion of the Turtle Mountains is outside the currently listed areas for the gray wolf and outside the proposed WGL DPS. While this area may provide a small area of marginal wolf habitat and support limited and occasional wolf reproduction, the Turtle Mountain area within the United States is not a significant portion of the WGL DPS because of its very small area and its setting as an island of old forest surrounded by a landscape largely modified for agriculture and grazing.⁹⁰

80. 258 F.3d 1136, 31 ELR 20846 (9th Cir. 2001) (lizard case).

81. 239 F. Supp. 2d 9 (D.D.C. 2002) (lynx case).

82. *Humane Soc'y of U.S. v. Jewell*, at **155-67.

83. 672 F. Supp. 2d 1105, 1122-26 (D. Mont. 2009).

84. *Id.* at 1125. The FWS proposal was rejected because the court found the state plan inadequate.

85. 76 Fed. Reg. at 81672-74.

86. *Id.* at 81690. See Bruce E. Kohn et al., *Wolves, Roads and Highway Development* 217, in *RECOVERY OF GRAY WOLVES*, *supra* note 4.

87. See David J. Mladenoff et al., *Changes in Occupied Wolf Habitat in the Northern Great Lakes Region* 119, in *RECOVERY OF GRAY WOLVES*, *supra* note 4; Adrian Treves et al., *Dispersal of Gray Wolves in the Great Lakes Region* 191, *id.*

88. 76 Fed. Reg. at 81689-92.

89. 74 Fed. Reg. 15070, 15081-82 (Apr. 2, 2009).

90. 71 Fed. Reg. 15266, 15279-80 (Mar. 27, 2007).

The existence of these small potential wolf habitats that were dismissed by FWS address the problem identified by the court in *Greater Yellowstone Coalition* that FWS had restricted its analysis to the wolf's current range in the WGL DPS. The court in *Greater Yellowstone Coalition* noted that FWS' exclusive focus on the current range of grizzly bears seems to contradict the holdings in the Defenders of Wildlife and National Wildlife Federation wolf cases, but distinguished those cases because FWS also considered areas outside the grizzly bear's current range in the DPS where it could expand in the future. FWS declared that only 68% of suitable habitat is currently occupied and the remainder includes a mix of public and private land that can provide range for a growing population in the GYA DPS.⁹¹ The existence of other limited areas in the WGL DPS that wolves might occupy addresses this concern.

2. Other Case Law

The case law supports FWS' decision, which only had to focus on significant portions of the wolf's range in the WGL DPS. The Ninth Circuit in *Defenders of Wildlife v. Norton* examined FWS' refusal to list the flat-tailed horned lizard because sufficient public land habitat ensured the viability of the species.⁹² The Ninth Circuit held that "a species can be extinct 'throughout . . . a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was."⁹³ FWS was required to analyze the status of the flat-tailed lizard on 34% of its historic range, which constituted a significant portion of the range.

In the follow-up case, *Tucson Herpetological Society v. Salazar*,⁹⁴ the Ninth Circuit reaffirmed its earlier decision, but found this requirement was met. The Secretary quantified the lizard's range 100 years ago and identified the habitat loss from this baseline. The Secretary concluded that 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.

The U.S. District Court for the District of Columbia in *Defenders of Wildlife v. Norton*⁹⁵ focused on FWS' determination of the significant portion of the lynx's range. The historic range of the lynx comprised four regions: Northeast, Great Lakes, Southern Rockies, and Northern Rockies. After protracted litigation, FWS listed the lynx as a threatened species in a single contiguous U.S. DPS, but

found the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of DPS.

The federal court rejected the FWS decision to exclude a significant portion of the lynx's range as "counterintuitive and contrary to the plain meaning of the ESA phrase 'significant portion of the range.'" The court stated that the absence of the lynx from 75% of its historic range was a "noticeably or measurably large amount" of species range, and held that "FWS's exclusive focus on one region where the lynx is more prevalent, despite its historic presence in three additional regions, is contrary to the expansive protection intended by the ESA."⁹⁶ The case demonstrates the inappropriate use of the DPS designation because FWS focused on the current range and failed to consider that lynx was still absent from significant portions of its historic range within the DPS where there was potential habitat.

C. Combined Mortality Figures

The *Humane Society v. Jewell* court held that FWS failed to explain the impact of combined mortality factors, particularly disease and human take, on the WGL DPS.⁹⁷ The court's decision was questionable: FWS' decision on these points was supported by empirical facts.

FWS recognized that several diseases have impacted the WGL wolf population. These impacts have been both direct, resulting in the mortality of individual wolves, and indirect, reducing the longevity and fecundity of individuals or entire packs. Canine parvovirus stalled wolf population growth in Wisconsin in the early and mid-1980s and was implicated in the decline of the isolated wolf population on Isle Royale in Michigan and Minnesota. Sarcocystis mange has affected wolf recovery in the Michigan upper peninsula and Wisconsin over the past 12 years and remains a continuing issue.

Nevertheless, the wolf population in the WGL has increased. FWS concluded that disease and parasites will not prevent continued population growth or maintenance of viable wolf population in the WGL DPS. Delisting poses no significant change to the incidence or impacts of disease and parasites on these wolves. Disease may eventually limit overall wolf carrying capacity and contribute to annual fluctuations in wolf abundance, but at current and foreseeable population levels, diseases are not likely to affect viability or place wolves at risk of again becoming an endangered or threatened species. FWS expects that disease monitoring by the states will identify future diseases and parasite problems in time to allow corrective action to avoid significant decline in overall population viability.⁹⁸

FWS determined that the wolf's high reproductive potential will allow it to withstand relatively high levels of human-caused mortality. Human-caused mortality will replace a portion of natural-caused mortality. WGL

91. *Greater Yellowstone Coal. v. Servheen*, 672 F. Supp. 2d 1105, 1125-26 (D. Mont. 2009).

92. *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 31 ELR 20846 (9th Cir. 2001) (lizard case).

93. *Id.* at 1145.

94. 566 F.3d 870 (9th Cir. 2009).

95. 239 F. Supp. 2d 9 (D.D.C. 2002) (lynx case).

96. *Id.* at 15-19.

97. *Humane Soc'y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **166-71 (D.D.C. Dec. 19, 2014).

98. 76 Fed. Reg. at 81694-98.

states have agreed to limit human-caused mortality. Despite human-caused mortality, the WGL wolf population has increased.⁹⁹

Michigan has experienced the least change in its wolf population since delisting. The estimated population in 2012-2013 was 658 wolves in 126 packs with an average pack size of 5.2 wolves. In 2013-2014, the estimated population decreased slightly to 636 wolves. These estimates represent 4% and 7% declines since the 2011-2012 estimate of 687.¹⁰⁰

Before Michigan implemented its first post-delisting hunting season in 2013, 73 wolf mortalities were recorded between January, 27, 2012 (the effective date of delisting) and June 30, 2013. Approximately 47% of the mortalities were related to legal controls of depredating or threatening wolves; about 19% and 18% resulted from illegal take or vehicle strikes, respectively. The remainder of mortalities was from natural or unknown causes. During the Michigan hunting season of November-December 2014, hunters took 23 wolves.¹⁰¹ This left 613 wolves in Michigan, well above the recovery target.

In Minnesota, the estimated wolf population in 2012-2013 was 2,211, reflecting a 24% decrease (700 fewer) since the 2007-2008 survey. Several factors contributed to the decline: prey density decreased, pack territories were larger, and pack size decreased. During the 2012-2013 hunting season, which immediately preceded the survey, 413 wolves were taken. In addition, 295 wolves were killed for depredation in 2012, the highest rate in any year.

The 2013-2014 Minnesota survey indicated that the decline did not continue. The 2013-2014 population was 2,423. The substantial decline in human-caused mortality between 2012 and 2013 played a significant role in maintenance of the wolf population. During the 2013-2014 hunting and trapping season, 238 wolves were taken, down from 413 during the prior year. Depredation control in 2013-2014 resulted in 127 wolf deaths, down from 295 in 2012-2013.¹⁰²

There was little change in Wisconsin's wolf population until the increase in human-caused mortality in 2013 resulted in the first population decline since 1993. The April 2013 estimated population was 809-834 wolves, decreased from the 2012 estimate of 815-880 wolves. In April 2014, there was an 18% decline in the wolf population, to 660-689. Hunters and trappers increased their take from 117 in 2012 to 257 in 2013. The increase in the harvest (140) approximated the decrease in wolf numbers (147). FWS concluded that wolves appear to have saturated high-quality habitat in Wisconsin and the statewide population may decrease unless human-caused mortality falls to

at least 22%. Annual rates of mortality have exceeded 25% since 2010.¹⁰³

D. Adequacy of State Plans

The *Humane Society v. Jewell* court determined that FWS failed to explain why the other six states in the WGL DPS did not have state management plans.¹⁰⁴ FWS recognized that there will be limited protection for the wolf in other areas of the DPS. North Dakota has no state endangered species law: After delisting, the wolf will be considered a fur-bearing animal with a regulated hunting season. In South Dakota, the wolf will be treated as wildlife subject to state regulation. In Iowa, the wolf will be treated as a fur-bearer with limited hunting season. In Illinois, the wolf will be treated as a threatened species under state law. In Indiana and Ohio, the wolf will receive no protection.¹⁰⁵ Since there are no potential habitats, no packs, and no migration corridors identified in the other six states, there is no need for those states to have wolf management plans. The peer reviewers concurred with this conclusion. One reviewer did recommend that all states in the DPS cooperate in the documenting and reporting of dispersing wolves.¹⁰⁶

The court held that FWS' failure to explain how Minnesota's state plan that allows virtually unregulated killing in 65% of the state does not constitute a threat to the species.¹⁰⁷ The court painted a bleak picture of Minnesota's plan, which includes provisions for population monitoring; the management of problem wolves, wolf habitat, and prey; the enforcement of laws prohibiting the taking of wolves; public education; and increased staffing for wolf management and research. The plan divides the state into wolf management zones A and B, which correspond to zones I through IV and V in the federal wolf recovery plan. In zone A, where over 85% of the wolves reside, state protections are nearly as strict as those under the ESA. Private wolf taking is permissible to stop depredation or a threat to life. In zone A, a wolf can be taken after verified depredation by a professional within one mile of the depredation site for up to 60 days. In zone B, which contains approximately 450 wolves constituting 15% of the state population, a depredating wolf can be taken for up to 214 days.

The Minnesota Department of Natural Resources (MDNR) can extend areas in which wolves can be taken at the request of landowners. Wolves can be killed to protect domestic animals, even if attacks or threatening behavior have not occurred. The take must be reported to MDNR within 48 hours. Zone B is not a free-fire zone; wolves can only be taken to stop depredation. While a significant decrease in the zone B wolf population may result, this will be consistent with the federal recovery plan, which

99. *Id.* at 81698-701.

100. U.S. FWS, WESTERN GREAT LAKES DISTINCT POPULATION SEGMENT OF GRAY WOLF: 2012-2014 POST DELISTING MONITORING ANNUAL REPORT 3 (2014).

101. *Id.* at 5.

102. *Id.* at 3, 5.

103. *Id.* at 4, 6.

104. *Humane Soc'y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **170-74 (D.D.C. Dec. 19, 2014).

105. 76 Fed. Reg. at 81713.

106. 74 Fed. Reg. 15070, 15081-82 (Apr. 2, 2009).

107. *Humane Soc'y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, at **174-78.

discourages the establishment of wolf population in that portion of the state.¹⁰⁸

V. Political Backlash

Republicans took control of Congress in 2015. Reacting to federal court decisions in the Wyoming and WGL wolf litigation, congressional Republicans attached a rider to the DOI Appropriation bill that delisted wolves in Wyoming and the WGL and precluded any judicial review. The effort was led by Rep. Reid Ribble (R-Wis.) and cosponsored by Reps. Dan Benishek (R-Mich.), Collin Peterson (D-Minn.) (a conservative Democrat), and Cynthia Lummis (R-Wyo.).¹⁰⁹ This strategy had been successful earlier. Congress attached a rider 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.¹¹⁰

Wolf supporters were very critical. Rep. Betty McCollum (D-Minn.), a member of the DOI Appropriation Committee, stated:

This rider is a tremendous overreach that would interfere in the federal listing of endangered species. Our committee's role is to appropriate the necessary funds to allow the expert staff of scientists and professionals to do their jobs working to protect endangered species. This bill should not be mandating which species do or do not require protection.¹¹¹

Representative Lummis responded: "The science has spoken: the gray wolf in Wyoming and WGL are recovered and will continue as such under the capable management of the states."¹¹²

Democratic efforts to eliminate the rider were unsuccessful. The House rejected an amendment to strip the delisting language from DOI's Appropriation bill and restore state management in NRM and WGL by a vote of 243-186.¹¹³ Nevertheless, the House DOI Appropriation bill stalled when the congressional leadership tabled it during the Confederate flag controversy in mid-2015.

Efforts began again in the fall of 2015. Republicans have put forth over 80 proposals that undermine the ESA and preclude protection for specific species. Ninety-two members of the House, led by Rep. Raúl Grijalva (D-N.M.),

have urged the president to veto any of these efforts.¹¹⁴ Recently, 25 Senate Democrats encouraged the president to reject any riders included in the House and Senate versions of the fiscal year 2016 DOI appropriations bill that would undermine ESA protections, including the removal of federal gray wolf protections.¹¹⁵

Environmental groups attempted to counter the delisting strategy. Twenty groups petitioned DOI to reclassify the gray wolf as a threatened species across the continental United States, except the Southwest where the Mexican wolf would retain endangered status. Reclassification would prevent recreational hunting and trapping, but permit federal regulation of problem wolves. The Center for Biological Diversity (CBD), a nonprofit conservation organization, took the position that:

A nationwide threatened designation would allow for the development of a national recovery plan to return wolves to places like the southern Rocky Mountains, the Sierra Nevada and Adirondacks. Downlisting is a good alternative to an attempt by some in Congress to do an end-run around the Endangered Species Act to end protection for wolves in the Great Lakes region, a move that would hurt wolf recovery and undermine the integrity of the law for all listed species.¹¹⁶

FWS, however, rejected the petition in June 2015. CBD responded:

Sadly the U.S. Fish and Wildlife Service seems content to let politicians in Congress, rather than scientists, decide the future of wolf recovery in the United States. Denying the petition to reclassify wolves is yet another sign this agency is hoping to wash its hands of wolf recovery and leave the job unfinished forever.¹¹⁷

There are other risks in the current Congress. Wolf reintroduction and recovery are part of the larger battle over the ESA. Various bills have been proposed that would severely limit the scope of the statute. In July 2015, the House passed the 21st Century Endangered Species Transparency Act,

108. 76 Fed. Reg. at 81701-04.

109. 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; Edward A. Fitzgerald, *DOW v. Jewell: Wyoming Wolves Receive a Reprieve—But for How Long?*, 45 ELR 10447 (May 2015).

110. Edward A. Fitzgerald, *Alliance for the Wild Rockies v. Salazar: Congress Behaving Badly*, 25 VILL. ENVTL. L.J. 351 (2014).

111. Press Release, Cong. Betty McCollum, Rep. McCollum Statement on Interior Appropriations Rider to Delist Gray Wolves (June 9, 2015), <https://mccollum.house.gov/press-release/rep-mccollum-statement-interior-appropriations-rider-delist-gray-wolves>.

112. *Lummis Joins Bi-Partisan Effort to Address Wolf in Funding Bill*, PLUS MEDIA SOLUTIONS, June 19, 2015.

113. *Lummis Defeats Attempts to Strip Wyoming Wolf Fix*, PLUS MEDIA SOLUTIONS, July 15, 2015.

114. Letter from Rep. Raúl Grijalva to President Obama (Sept. 28, 2015), available at <http://democrats-naturalresources.house.gov/imo/media/doc/Sept.%2028%20Letter%20to%20President%20Obama%20on%20Vetoing%20Bad%20ESA%20Provisions1.pdf>. Cathy Cangas, *Urge Barrasso to Back Off Bill That Threatens Wolves*, WYO. TRIB.-EAGLE, Nov. 30, 2015, at http://www.wyomingnews.com/articles/2015/11/30/opinion/guest_column/01column_11-30-15.txt#.VmcXM78XeQc. Press Release, Defenders of Wildlife, Congressman Grijalva Leads 91 Members of Congress in Telling Administration to "Veto Extinction" (Sept. 28, 2015), <http://www.defenders.org/press-release/congressman-grijalva-leads-91-members-congress-telling-administration-%E2%80%9Cveto-extinction>.

115. Press Release, Sen. Cory Booker (D-N.J.), 25 Senate Democrats Urge White House to Reject Spending Bill Riders That Would Undermine ESA Protections (Nov. 5, 2015), https://www.booker.senate.gov/?p=press_release&id=327.

116. Press Release, Center for Biological Diversity, Bipartisan Group of Lawmakers Supports Downlisting Gray Wolves Nationwide (Mar. 4, 2015), http://www.biologicaldiversity.org/news/press_releases/2015/wolf-03-04-2015.html.

117. Press Release, Center for Biological Diversity, U.S. Fish and Wildlife Service Rejects Plan to Reclassify Wolves, Keep Wolf Recovery Going (June 30, 2015), http://www.biologicaldiversity.org/news/press_releases/2015/wolf-06-30-2015.html.

which would require 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 governments in making listing decisions; and (4) limit the amount of attorneys fees awarded to prevailing parties in ESA citizen suits.¹¹⁸

A recent study by CBD found that there have been 164 legislative attacks on the ESA, averaging 33 per year since 2011.¹¹⁹ Only three were successful. Between 1999 and 2010, there were only 69 attacks, averaging 5 per year. Since January 2015 there have been 66 attacks on the ESA, 17 of which were specifically against the gray wolf. Almost all (93%) of the attacks were sponsored by Republicans, including all 66 in 2015. Five Republican members of Congress have been responsible for 25% of the attacks since 2011. The Center attributes this increased hostility to the increase in campaign contributions by ESA opponents. From 2004 to 2014, the agriculture industry contributions jumped from \$27 million to \$40 million, and the oil and gas industry contributions increased from \$10.5 million to \$25 million. The researchers concluded that: “We are witnessing a war on the ESA unlike anything we’ve seen before. If it is allowed to succeed, this Republican assault will dismantle the world’s most effective law for protecting endangered wildlife and put scores of species on the path to extinction.”¹²⁰

Threats have also emanated from the Executive. The Obama Administration in 2013 proposed delisting the wolf across much of the United States, even though wolves only occupy 10% of their historic habitat. The Administration’s proposal relied on questionable science and was developed through a dubious process. It focused on the current range of the wolf, but failed to recognize that the wolf is still missing from significant portions of its historic range where suitable habitat remains.¹²¹ Nevertheless, in May 2015, 37 members of the House asked Secretary of the Interior Jewell to finalize the Administration’s 2013 flawed proposed regulation.¹²²

VI. Conclusion

Delisting the WGL DPS will return the wolf to state control, which should increase social tolerance. Experts agree

that social tolerance is the key to the long-term survival of the wolf. David Mech, a renowned wolf biologist with the U.S. Geological Service and University of Minnesota, declared that “long-term survival of wolves . . . ultimately depends on human tolerance.”¹²³ Federal courts and FWS recognize the need for social tolerance.¹²⁴ The court’s decision in *Humane Society v. Jewell* will decrease social tolerance. Dr. Adrian Treves, a professor at the University of Wisconsin, indicates that support for wolves decreased from 2001-2009 when FWS unsuccessfully attempted to delist the wolves and return control to the states. Dr. Treves noted that “attitudes towards wolves have become less favorable, and fear of wolves, perceived competition for deer, and reported inclination to illegally kill wolves increased.” Research also indicates there is “strong support for wolf recovery if the adverse impacts on recreational activities and livestock production can be minimized.”¹²⁵

The WGL states have a strong stake in the management of wolves, which fall under their public trust responsibility.¹²⁶ State control gives the public a sense of ownership; builds support for conservation; provides incentives for volunteers; allocates the costs of supporting wildlife to its users; and raises revenues for wolf management.¹²⁷ Return to state control is one of the principal goals of the ESA. The Conference Committee on the ESA in 1973 noted that “the successful development of an endangered species program will ultimately depend on good working arrangements between the federal agencies, which have broad policy perspective and authority, and the state agencies, which have the physical facilities and personnel to see that state and federal endangered species policies are properly executed.”¹²⁸

Control over the WGL wolves should be returned to the states. Experts determined that it is “counterproductive” to retain federal protection for the WGL wolves, which need active state management.¹²⁹ The National Wildlife Federation declared in a press release that “Western Great Lakes

118. H.R. 1667 (2015). See also Rep. Doug Collins’ Bill Opens ES Data to Public Review, PLUS MEDIA SOLUTIONS, Apr. 1, 2015.

119. Jamie Pang & Noah Greenwald, Center for Biological Diversity, *Politics of Extinction* (2015).

120. *Id.*

121. 78 Fed. Reg. 35664 (June 13, 2013). See Edward A. Fitzgerald, *Wolf Delisting: Old Wine in New Bottles*, 44 ELR 10413 (May 2014).

122. Letter to FWS Director Ashe and Secretary Jewell Supporting a Proposed Rule to Delist the Gray Wolf (Apr. 28, 2015), at <http://newhouse.house.gov/sites/newhouse.house.gov/files/Newhouse%20Ltr%20on%20Gray%20Wolves%20to%20Interior%20and%20USFWS.pdf>; Press Release, Sen. Ron Johnson (R-Wis.), Johnson, Barrasso Introduce Gray Wolf Delisting Bill (Nov. 12, 2015), at <http://www.ronjohnson.senate.gov/public/index.cfm/press-releases?ID=724081a8-4380-475c-8a31-eblc6e5dd19e>.

123. Hunter Conservation Coalition’s Cross-Motion for Summary Judgment, at 30-31, *Humane Soc’y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, 44 ELR 20274 (D.D.C. Dec. 19, 2014).

124. See *Wyoming v. Department of Interior*, 2010 WL 4814950, *10 (D. Wyo. Nov. 18, 2010); 76 Fed. Reg. at 81718.

125. 76 Fed. Reg. at 81718-20.

126. See *Martin v. Waddell*, 41 U.S. 367, 407-08 (1867); *Hughes v. Oklahoma*, 441 U.S. 322, 337, 9 ELR 20360 (1979) (acknowledges that wildlife management falls under the states’ public trust); Edward A. Fitzgerald, *The Alaskan Wolf War: The Public Trust Doctrine Goes Missing in Action*, 15 ANIMAL L. REV. 193 (2009).

127. In 2011, sportsmen spent \$3.9 billion in Minnesota, \$5.5 billion in Wisconsin, and \$6.1 billion in Michigan. See Brief of Amicus Curiae Ass’n of Fish and Wildlife Agencies, at 15, *Humane Soc’y of U.S. v. Jewell*, 2014 U.S. Dist. LEXIS 175846, 14 ELR 20274 (D.D.C. Dec. 19, 2014).

128. H.R. REP. NO. 93-740, at 26 (1973) (Conf. Rep.), reprinted in *Legislative History*, *supra* note 44, at 451.

129. Adrian Wydeven & Erik R. Olsen, *Swings in Management Challenge Wolf Conservation in Wisconsin*, INTERNATIONAL WOLF 4-7 (Fall 2015). Twenty-six scientists and wildlife managers have called for delisting the WGL wolves. Virginia Morell, *Scientists Call for Lifting Protections for Great Lakes Wolves*, SCIENCE, Nov. 20, 2015, at <http://news.sciencemag.org/plants-animals/2015/11/scientists-call-lifting-protections-great-lakes-wolves>. Another groups of 29 scientists rebutted the call, declaring that delisting the WGL wolves is not supported by the best available science. John Fleisher, *Scientists Call for Continuing Great Lakes Wolf Protection*,

gray wolves are thriving and healthy, have fully recovered, and are ready to be declared an Endangered Species Act success story.”¹³⁰ The organization said that “regional recovery needs to be recognized and result in delisting. We’ll continue to consider all options to advance delisting and to restore state gray wolf management authority.”¹³¹

The court’s decision in *Humane Society v. Jewell* challenges the entire wolf recovery program that began back in the 1970s. FWS has always focused on a regional recovery

strategy. To impugn this approach after 40 years of controversy calls into question the entire wolf recovery program. A national wolf strategy, though laudable, has been attempted and failed. The court’s decision jeopardizes much-needed future federal efforts to restore the wolf to the Pacific Northwest, the Northeast, and the Southern Rockies. The decision is particularly dangerous in the current political climate where the Republican Congress is seeking to eviscerate wolf recovery and the ESA.

WASH. TIMES, Nov. 24, 2015, at <http://www.washingtontimes.com/news/2015/nov/24/scientists-call-for-continuing-great-lakes-wolf-pr/>.

130. Press Release, National Wildlife Fed’n, National Wildlife Federation Support for Great Lakes Gray Wolf Delisting Reaffirmed at National Meeting (Mar. 31, 2015), www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Wildlife/2015/03-31-15-NWF-Support-for-Great-Lakes-Gray-Wolf-Delisting-Reaffirmed-at-Annual-Meeting.aspx.

131. *Id.*