



# Gray Wolves Under the Endangered Species Act: Distinct Population Segments and Experimental Populations

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## Summary

After near eradication of the gray wolf from the lower 48 states in the first half of the 20<sup>th</sup> century, the wolf was on the Endangered Species Act's (ESA's) first list of endangered species, divided into two subspecies—the Eastern Timberwolf and the northern Rocky Mountain wolf. In 1978 the wolf was listed at the species level (the gray wolf) as endangered in all of the conterminous 48 states except Minnesota, where it was listed as threatened. With the exception of *experimental populations* established in the 1990s, in which the U.S. Fish and Wildlife Service (FWS) reintroduced wolves to selected areas, protections for the gray wolf have diminished as wolf populations have increased in some areas—such as in the Northern Rocky Mountains. The use of *distinct population segments* (DPSs), a term created in the 1978 ESA amendments, has played a role in that reduced protection. DPSs allow vertebrate species to be divided into distinct groups, based on geography and genetic distinctions. This report analyzes the DPS designation process as it is applied to the gray wolf. It also examines experimental populations of wolves under the ESA.

Experimental populations (Ex Pops) of wolves were reintroduced in three regions in the United States in the 1990s: the Central Idaho population, the Yellowstone population, and the Blue Range population in Arizona and New Mexico (known as Mexican gray wolves). The Ex Pops in Central Idaho and Yellowstone have grown to over 1,700 wolves as of December 2009, while the Mexican gray wolf population has not surpassed 59 wolves, and as of January 2011 totaled 50.

ESA protection for wolf DPSs has changed back and forth since the first DPSs—Western, Eastern, and Southwestern—were proposed in 2003. Each effort by FWS to delist the wolf or designate a DPS has been rejected by a court. In 2003, FWS determined that because of the population size, the Western and Eastern DPSs no longer needed the protection of the ESA, and so those DPSs were downlisted from endangered to threatened. Courts nullified the rulemaking. In 2007, FWS designated and delisted the Western Great Lakes DPS, and in early 2008, FWS designated and delisted the Northern Rocky Mountain DPS. However, courts found both delistings flawed and vacated both rulemakings. In December 2008, FWS returned wolves to their former protected status, eliminating the DPSs, and redesignating the wolves in southern Montana, southern Idaho, and all of Wyoming as “nonessential experimental populations.” In April 2009, FWS again established DPSs in the Western Great Lakes and the Northern Rockies and delisted both populations except for in Wyoming. FWS was sued regarding the Western Great Lakes delisting and settled the case, returning the population to its previous status (threatened and endangered). In August 2010, a court ruled that the Northern Rockies delisting violated the ESA, directing that the delisting be declared invalid. The Northern Rockies wolves were returned to their experimental population status, meaning they are treated as threatened in most circumstances but are endangered outside of the Ex Pop boundaries.

Some Members of the 112<sup>th</sup> Congress responded to court nullification of the regulatory delistings by proposing legislation to eliminate all protections of the gray wolf nationwide under the ESA (H.R. 509—Rehberg; S. 249—Hatch), to let states decide how to protect wolves found in Idaho and Montana (H.R. 510—Rehberg), or to direct FWS to reissue the regulatory delisting of April 2009, making the rule immune from judicial review (H.R. 1, § 1713—Simpson). If passed, the delisting bill would be the first law to delist a species under the ESA. The 111<sup>th</sup> Congress also had proposed legislation to restrict protection of the wolf. Three House bills would have reduced or eliminated ESA protections of the gray wolf: H.R. 6028, H.R. 6485, and H.R. 6486. Two Senate bills took more regional approaches addressing wolves in the Northwest: S. 3825 and S. 3864.

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## Background and Regulatory History

The history of gray wolf protection is interconnected with the history of the Endangered Species Act (ESA) (16 U.S.C. §§ 1531–1543). Gray wolf protection began at the nascency of the ESA, when it was one of the first species covered under the Endangered Species Protection Act of 1966.<sup>1</sup> As the ESA has been amended, so has gray wolf protection.<sup>2</sup> The act provides the basis for determining which species are threatened and endangered, and how those listed species will be protected. Amendments allow consideration of distinct groups within vertebrate species for protection. The act allows introduction of experimental populations to areas where the species no longer exists, and provides regulatory protections for that introduction. Each of these elements will be discussed in this report generally, and more specifically in the context of gray wolf protection.

For centuries, wolf populations have been under pressure by humans. The effort to reduce or eliminate the species was designed to protect humans from a perceived direct threat to humans or to protect livestock or favored game species. Wolves were eventually eliminated in most states in an effort supported by the science community at the time. But coinciding roughly with the forester Aldo Leopold's essay, "Killing the Wolf," in *A Sand County Almanac* in 1948, this view began to change. Leopold wrote:

I was young then, and full of trigger-itch; I thought that because fewer wolves meant more deer, that no wolves would mean hunters' paradise. But after seeing the green fire die, I sensed that neither the wolf nor the mountain agreed with such a view.... Since then I have lived to see state after state extirpate its wolves. I have watched the face of many a newly wolfless mountain, and seen the south-facing slopes wrinkle with a maze of new deer trails. I have seen every edible bush and seedling browsed, first to anaemic desuetude, and then to death.

In 1967 when the gray wolf was listed under the first version of the Endangered Species Act, it was listed in two subspecies, the Eastern Timber wolf, and the northern Rocky Mountain wolf.<sup>3</sup> In 1978 the gray wolf was relisted at the species level as two populations: endangered throughout the lower 48 states, with the exception of Minnesota, where it was listed as threatened.<sup>4</sup> In the 1990s actions were taken to reintroduce the wolf into areas where it had been eradicated. Experimental populations were introduced into the Yellowstone area and central Idaho,<sup>5</sup> and in Arizona, New Mexico and Texas.<sup>6</sup> Efforts to protect the wolf have always been controversial, however. The U.S. Fish and Wildlife Service (FWS) reports receiving, and denying, "several petitions" to delist the wolf in all or part of the 48 states.<sup>7</sup> Additionally, in 1987 legislation was

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<sup>1</sup> P.L. 89-669, 80 Stat. 926 (October 15, 1966).

<sup>2</sup> This report will show that wolves in the United States were listed in all of the available categories for a vertebrate species: (1) never listed (Alaska); (2) delisted (the DPSs described below); (3) experimental (Southwest; Yellowstone and Central Idaho); (4) threatened (Minnesota); and (5) endangered (every wolf that was not a DPS, experimental population, or in Minnesota).

<sup>3</sup> The first list of endangered species included the timber wolf (*Canis lupus lycaon*) and the red wolf (*Canis niger*, now called *Canis rufus*). 32 Fed. Reg. 4001 (March 11, 1967).

<sup>4</sup> 43 Fed. Reg. 9607 (March 9, 1978).

<sup>5</sup> 59 Fed. Reg. 60252 (November 22, 1994).

<sup>6</sup> 63 Fed. Reg. 1752 (January 12, 1998).

<sup>7</sup> 68 Fed. Reg. 15803, 15807 (April 1, 2003).

introduced to remove the gray wolf from the ESA protected list.<sup>8</sup> The amendment failed. Several bills in the 111<sup>th</sup> Congress attempted to reduce or eliminate ESA protections for the gray wolf in the absence of sustained regulatory changes, and bills have been introduced in the 112<sup>th</sup> Congress, including within the Continuing Resolution. (See “Legislation,” below.)

## Wolf Populations: A Taxonomic View

Like many large mammals, such as bears (*Ursus arctos*), mountain lions (*Felis concolor*), and white-tailed deer (*Odocoileus virginianus*), gray wolves (*Canis lupus*) have a complicated, even convoluted, taxonomic history. Variations in color, size, and bone structure have led some mammalogists to name wolves in various areas as different subspecies or populations, where other credible experts would see only a single species with variability. Here are scientific definitions of a few key terms:

- A *population* is a group of “organisms of the same species that inhabit a specific area.”
- A *species* is a “naturally [occurring] population or a group of potentially interbreeding populations that is reproductively isolated (i.e., cannot exchange genetic material) from other such populations or groups.”
- A *subspecies* is a “taxonomic category that subdivides species into morphologically distinct groups of individuals representing a step toward the production of a new species, although they are still fully capable of interbreeding. Subspecies are usually geographically isolated.”
- *Taxon*, or the plural *taxa*, is defined as “a grouping of organisms given a formal taxonomic name at any rank: species, genus, family, order, class, division, phylum, or kingdom.”<sup>9</sup>

These terms may appear clear; however, there are no simple measures to draw unequivocal distinctions. Biologists commonly divide their colleagues into “lumpers” and “splitters,” based on their inclinations in classifying organisms. As the names suggest, lumpers are those who tend to minimize differences, and see one or a few species, perhaps with some variations, while splitters would tend to emphasize those differences, dividing a species into many subspecies, or populations. For wolves, which are (or were) found in temperate and polar areas throughout the Northern Hemisphere, some observers (splitters) would argue that there are as many as 24 subspecies in North America and eight in Europe and Asia.<sup>10</sup> More recently, lumpers have had the upper hand, and FWS recognizes two species (gray and red wolves), and divides the gray wolf into six “distinct population segments” (DPSs), based in part on administrative and procedural criteria.<sup>11</sup>

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<sup>8</sup> The proposed legislation would have amended an authorizations act to fund the ESA. H.Amdt. 576 (100<sup>th</sup> Congress): “(b) Exception to Listing.—Upon enactment of this subsection of this Act, the gray wolf, *Canis Lupus*, shall not be considered an endangered or threatened species under the Endangered Species Act of 1973.”

<sup>9</sup> All the definitions are from Henry W. Art (ed.), *The Dictionary of Ecology and Environmental Science* (New York: Henry Holt and Co. 1993).

<sup>10</sup> See discussion, citing various authors, in L. David Mech, *The Wolf: The Ecology and Behavior of an Endangered Species*, pp. 29-31 (Garden City, NY: Natural History Press 1970).

<sup>11</sup> The wolves of Alaska, which have never been listed under the ESA, would constitute a seventh population, with (continued...)

While confusing to the non-scientist, this muddled state of taxonomic affairs is entirely predictable for several reasons. First, wolves are extremely wide-ranging, both as a species and as individuals, so interbreeding among them could certainly muddy the picture. Second, the consistency of variations over time is hard to determine, since long-range studies of long-lived species are rare. Third, evolutionary change does not stop, and wolves are an adaptable species, as shown by their behavior and by their presence in a tremendous variety of ecosystems.<sup>12</sup> If FWS scientists' choice of state boundaries to delineate wolf populations is criticized as arbitrary, the debate among academic scientists also has an air of informed judgment—and there is no reason to predict that either debate will end any time soon.

## Experimental Populations

In 1982 Congress added the concept of experimental populations to the ESA as a way of reintroducing species without severe restrictions on the use of private and public land in the area.<sup>13</sup> Experimental population designations are made under Section 10(j) of the ESA. They apply only to species already listed as threatened or endangered. The practice allows introduction of a species outside its current range to restore it to its historic range.

Two criteria must be met for an experimental population to comply with the law. First, the Department of the Interior (DOI) must authorize the release of the population. Second, the population must be wholly separate geographically from other animals of that species.<sup>14</sup> Congress required the separation so that the introduced population could be clearly distinguished.

Members of an experimental population are treated as threatened under the act, and thus can have special rules written for them.<sup>15</sup> In fact, Congress referred to special rules for experimental populations as a way to reduce public opposition to the release of certain species, using the red wolf as an example.<sup>16</sup> Congress suggested in a report that the special regulations could allow killing members of the species:

The committee fully expects that there will be instances where the regulations allow for the incidental take of experimental populations.... The committee also expects that, where appropriate, the regulations could allow for the directed taking of experimental populations. For example, the release of experimental populations of predators, such as red wolves, could allow for the taking of these animals if depredations occur or if the release of these populations will continue to be frustrated by public opposition.<sup>17</sup>

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(...continued)

equally uncertain boundaries.

<sup>12</sup> For example, should global warming proceed and arctic snow cover diminish, will the genes for white coats diminish in the arctic wolves? That may be likely, since more brightly colored wolves would be at a disadvantage in much of the year and over a growing area. Natural selection would then tend to disfavor these animals and their offspring.

<sup>13</sup> P.L. 97-304 §6(6), 96 Stat. 1424; 16 U.S.C. § 1539(j).

<sup>14</sup> ESA § 10(j); 16 U.S.C. § 1539(j).

<sup>15</sup> ESA § 10(j)(2)(C); 16 U.S.C. § 1539(j)(2)(C). *See* discussion of Section 4(d) Rules, below.

<sup>16</sup> 1982 U.S. Code Cong. and Admin. News, p. 2807.

<sup>17</sup> 1982 U.S. Code Cong. and Admin. News, at 2834.

Unlike distinct population segments, experimental populations (Ex Pops) may not necessarily have the same protections under the ESA. Section 10(j)(2)(B) requires FWS to determine whether the experimental population is essential to the continued existence of an endangered or threatened species. If so, the experimental population is deemed essential; otherwise, it is deemed nonessential. Currently, there are no essential experimental populations. For nonessential Ex Pops, the act limits the consultation requirements under Section 7(a)(2). A nonessential Ex Pop is treated as a species that is *proposed for listing* for Section 7 purposes, meaning agencies are required to *confer* under Section 7(a)(4), unless the species is in a national wildlife refuge or a national park, and then a consultation is still required.<sup>18</sup> There is no critical habitat designation for an experimental population if it is nonessential.

Examples of species with nonessential experimental populations are the Colorado pikeminnow (or squawfish), the southern sea otter, the gray wolf in the Southwest, Idaho, and in the Yellowstone areas, the black-footed ferret, and the whooping crane.

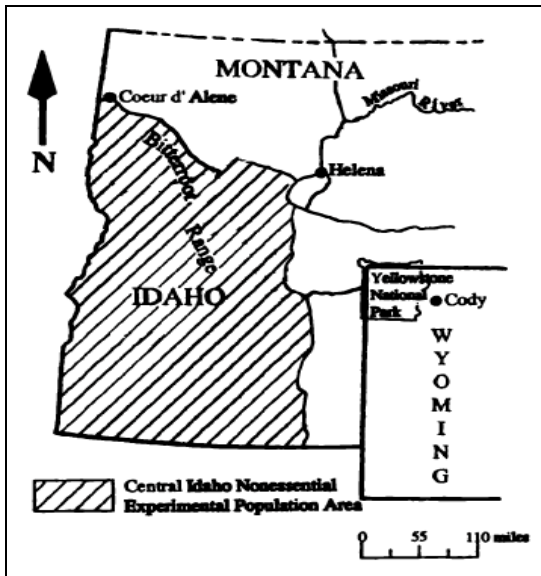
## Experimental Populations of Gray Wolves

Despite near-eradication of the wolf in the lower 48 states, some suitable habitat in the wolf's historic range survived, though in a highly modified form. At the end of the 20<sup>th</sup> century, FWS planned to reintroduce the wolf to parts of its historic range, using the experimental population (Ex Pop) provisions of the ESA. No reintroduction was more controversial than that in the greater Yellowstone ecosystem, where all other large vertebrates were still present, and where many scientists agreed that elk populations—a favorite wolf prey—had reached harmful levels. In 1995 and 1996 FWS released 66 gray wolves from Canada in Yellowstone and central Idaho. (See **Figure 1** and **Figure 2**.)

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<sup>18</sup> See 16 U.S.C. § 1536 for the consultation provision of the ESA.

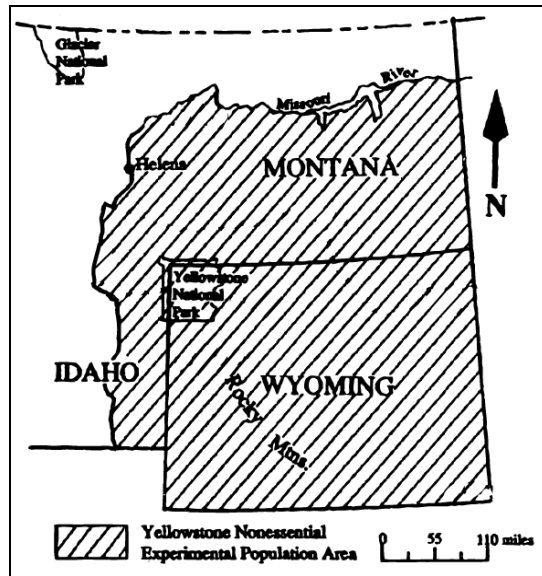
**Figure 1. Reintroduction Zone of the Central Idaho Experimental Population**



**Source:** 59 Fed. Reg. 60281 (November 22, 1994), as modified by CRS.

**Note:** This same area was designated for the population in 2010. 75 Fed. Reg. 65578 (October 26, 2010).

**Figure 2. Reintroduction Zone of the Yellowstone Experimental Population**



**Source:** 59 Fed. Reg. 60281 (November 22, 1994), as modified by CRS.

**Note:** This same area was designated for the population in 2010. 75 Fed. Reg. 65579 (October 26, 2010).

When wolves were returned, the science community was nearly giddy in anticipating the potential effects from a first-ever return of a major predator to a nearly intact ecosystem. The excitement was intense partly because the Yellowstone area was already well studied, with long-term data on many species, including both competitors (e.g., coyotes and, to some extent, grizzlies) and potential prey (e.g., elk, moose, and bison). As scientists had expected, wolves had a profound effect on elk, but there is also evidence of effects that were less predictable—on aspens, cottonwoods, beavers, beetles, mice, red foxes, ravens, and voles, among others.<sup>19</sup> However, the road to the reintroduction was, and still is, fraught with litigation and controversy.

Wolves also had been exterminated in the Southwest. FWS recognized a separate subspecies, the Mexican wolf (*Canis lupus baileyi*), which was probably gone from the United States but found in very low numbers in Mexico. After a cooperative and successful captive breeding program of wolves obtained from Mexico, reintroduction was begun in 1998, in an area centered in the Apache National Forest in Arizona and the Gila National Forest in New Mexico. In both the Yellowstone and the Southwest cases, litigation was a major factor in the reintroduction effort.

<sup>19</sup> For an account of some of the changes, and a sense of the excitement in the scientific community, see Jim Robbins, "Lessons from the Wolf," *Scientific American* (June 2004).



In February 2010, FWS announced that the population of Mexican gray wolves totaled 42, the lowest since 2002.<sup>20</sup> It was a drop of 20% from the previous year's total of 52, according to FWS. In January 2011, the population totaled 50, nearly a 20% increase.<sup>21</sup>

## **Yellowstone and Idaho Litigation**

While the recovery plan for the Northern Rockies gray wolf acknowledged that the species may require reintroduction into the area around Yellowstone National Park, that decision was controversial. Suit was filed to compel FWS to bring some wolves to Yellowstone. However, the court ruled the action was moot as it could not compel FWS to act,<sup>22</sup> and an appropriations rider in 1992 blocked any funding for bringing the wolf to the area.

In 1995 and 1996 FWS released 66 gray wolves from Canada in Yellowstone and central Idaho. A man accused of violating the ESA for killing one member of the Yellowstone Ex Pop argued that he had killed a Canada wolf, which was not an endangered species. This argument failed. The Ninth Circuit upheld the regulations for the experimental population, holding that once the wolves from Canada were introduced into the park, they became protected under the ESA.<sup>23</sup>

Another lawsuit argued that because the Yellowstone Ex Pop may interact and breed with the few lone wolves in the area, the experimental population designation violated Section 10(j) of the ESA. (The lone wolves may have been remaining wolves that somehow survived extermination, feral wolves, or wolves naturally dispersing from farther north.) Section 10(j) requires that experimental populations must be “wholly separate geographically from nonexperimental populations of the same species.”<sup>24</sup> The district court ruled that the Yellowstone population would have to be removed. However, the Tenth Circuit overruled the decision.<sup>25</sup> The court rejected the argument that the legislative history of Ex Pops (as discussed earlier in this report) meant that the experimental population must be separate from every naturally occurring individual animal. The court deferred to the DOI management plan for the reintroduction, finding it did not conflict with the statute.

A more recent claim disputed FWS management of the wolves. A rancher argued the agency failed to control wolves that were preying on livestock. After FWS killed three wolves, including the lead male wolf of the offending pack, no more depredations were found. The court dismissed the claims on procedural grounds.<sup>26</sup>

After courts ruled that FWS had not satisfied the requirements of the ESA in making distinct population segments in the Northern Rockies area, FWS re-established the nonessential Ex Pops of the Yellowstone and Central Idaho areas, using the same regulatory boundaries as set in 1994

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<sup>20</sup> FWS Southwest Region Press Release: “2009 Mexican Wolf Population Survey Complete” (February 5, 2010), available at <http://www.fws.gov/southwest/docs/WolffinalPopCount2009NewsReleaseFeb52010.pdf>.

<sup>21</sup> FWS, Blue Range Wolf Reintroduction Area Monthly Project Updates, online at [http://www.fws.gov/southwest/es/mexicanwolf/BRWRP\\_notes.cfm](http://www.fws.gov/southwest/es/mexicanwolf/BRWRP_notes.cfm).

<sup>22</sup> *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834 (D.D.C. 1992) (referring to P.L. 102-154, 105 Stat. 970, 993-94 (1991)).

<sup>23</sup> *United States v. McKittrick*, 142 F.3d 1170 (9<sup>th</sup> Cir. 1998).

<sup>24</sup> ESA § 10(j)(1); 16 U.S.C. § 1539(j)(1).

<sup>25</sup> *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224 (10<sup>th</sup> Cir. 2000).

<sup>26</sup> *Gordon v. Norton*, 322 F.3d 1213 (10<sup>th</sup> Cir. 2003).

(see **Figure 1** and **Figure 2**). Wolves in the Northwest outside of those regulatory areas are again considered endangered.

## Southwest Litigation

The reintroduction of the wolf to the Southwest was no less controversial. Ranchers sued, claiming the action violated the National Environmental Policy Act (NEPA), as well as the ESA. The court found for FWS, even though livestock owners and FWS had different estimates as to the impact of the wolves on domesticated stock.<sup>27</sup>

Once the wolf was reintroduced to the Southwest, environmentalists sued FWS for not acting to modify the reintroduction regulations.<sup>28</sup> The action was dismissed as moot. The area remains a center of intense public controversy about wolves. In 2010 suit was filed to force the listing of the Mexican gray wolf as either an endangered species or a DPS.<sup>29</sup> If successful, the suit would end the Ex Pop status of the Mexican gray wolf, eliminating the exceptions that allow *takes* of those wolves.

## Species and Distinct Population Segments (DPSs)

In addition to illustrating the use of experimental populations by FWS, the gray wolf is also a significant species in the history of distinct population segments. The creation of distinct population segments was another attempt of legislating protection for certain species. If the scientific community is somewhat inconsistent in identifying species, the law has fared no better. The ESA definition of *species* has changed since the early days of the act. In 1973 the definition included “any 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.”<sup>30</sup> In 1978 Congress amended that definition to include the term *distinct population segment* (DPS) and was limited to vertebrate DPSs only.<sup>31</sup> The change was controversial.

The General Accounting Office (GAO) (now the Government Accountability Office) recommended limiting the definition of *species* to higher taxonomic categories than populations, and excluding all distinct populations, including geographically separated populations.<sup>32</sup> GAO proposed the following definition: “The term ‘species’ includes any subspecies of fish, wildlife, or plants.”<sup>33</sup> GAO found the 1973 definition to be overly inclusive:

We found that Interior’s Fish and Wildlife Service is listing populations of species in limited geographical areas as endangered or threatened instead of listing the entire species. This has occurred because the Service has interpreted the definition of “species” to include populations, regardless of their size, location, or total numbers. Using the Service’s

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<sup>27</sup> New Mexico Cattle Growers v. U.S. Fish and Wildlife Service, 1999 WL 34797509 (D.N.M. 1999).

<sup>28</sup> Center for Biological Diversity v. Kempthorne, 498 F. Supp. 2d 293 (D.D.C. 2007).

<sup>29</sup> Center for Biological Diversity v. Salazar (D.D.C. filed January 2010).

<sup>30</sup> P.L. 93-205, § 3(11), 87 Stat. 886.

<sup>31</sup> P.L. 95-632; 16 U.S.C. § 1532(16).

<sup>32</sup> GAO Testimony before the Subcommittee on Resource Protection, No. 108960, p. 5 (April 3, 1979).

<sup>33</sup> GAO Testimony before the Subcommittee on Resource Protection, No. 108960, Attach. 1 (April 3, 1979).

interpretation of the term, squirrels in a specific city park could be listed as endangered even though there is an abundance of squirrels in other parks in the same city and elsewhere. Such listings had increased the number of potential conflicts between endangered and threatened species and federal, state, and private projects and programs.<sup>34</sup>

Congress did not follow the GAO recommendation. It agreed with FWS that the service needed to be able to adopt different management practices for different populations, based on their need. A Senate committee report discussing populations said “the committee agrees that there may be instances in which FWS should provide for different levels of protection for populations of the same species,” although it advised the practice be used “sparingly and only when the biological evidence indicates that such action is warranted.”<sup>35</sup>

Thus, Congress revised and limited the definition of *species* in 1978 by eliminating taxonomic categories below subspecies from the definition, except for vertebrates.<sup>36</sup> The revised, and still current, definition is “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”<sup>37</sup> However, the phrase *distinct population segment* had no meaning in the scientific community outside of the ESA, and was not used in endangered species listings by FWS for nearly two decades.

## Regulatory History of DPSs

A DPS generally refers to a portion of a listed species, separated from the rest of the species by genetic distinction and range. The legislative history offers two examples of when different protection is appropriate within a species: (1) when a U.S. population of an animal is near extinction even though another population outside the United States is more abundant; and (2) where conclusive data have been available only for certain populations of a species and not for the species as a whole.<sup>38</sup>

In 1996 a policy regarding DPS was introduced by FWS (hereinafter referred to as “the Policy”).<sup>39</sup> The Policy contains the criteria that must be met for protection of a species at the population level. First, the population segment must be discrete. Factors considered to determine discreteness are whether the segment is “markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors.”<sup>40</sup> Discreteness can also be found if the population is delimited by international governmental boundaries. Although state boundaries are frequently used to describe a DPS, they cannot be used under the Policy to determine discreteness.

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<sup>34</sup> GAO Testimony before the Subcommittee on Resource Protection, No. 108960, p. 3-4 (April 3, 1979).

<sup>35</sup> S.Rept. 96-151, p. 7 (May 15, 1979). The discussion occurs after the amendment, because, according to the Senate report, “some clarification would be useful.”

<sup>36</sup> H.Rept. 95-1625 at 25 (September 25, 1978). Restriction to vertebrates is a severe limitation in terms of numbers of species able to enjoy this level of protection. Insects alone outnumber all other animals by three to one. Donald J. Borror, et al., *An Introduction to the Study of Insects*, p. 1. (Saunders College Publishing: New York, 5<sup>th</sup> ed. 1981).

<sup>37</sup> ESA § 3; 16 U.S.C. § 1532(16).

<sup>38</sup> S.Rept. 96-151, p. 7 (May 15, 1979).

<sup>39</sup> 61 Fed. Reg. 4722 (February 7, 1996).

<sup>40</sup> 61 Fed. Reg. at 4725.

Next, the population segment must be found to be significant, meaning its demise would be an important loss of genetic diversity.<sup>41</sup> Four factors are listed in the Policy for determining a species' significance: (1) persistence of the segment in an ecological setting unusual or unique for the taxon; (2) evidence that loss of the DPS would result in a significant gap in the range of the taxon; (3) evidence that the DPS represents the only surviving natural occurrence of a taxon within its historic range; or (4) evidence that the DPS differs markedly from other populations of the species in its genetic characteristics. Genetic evidence is allowed to be considered but is not required. The Policy indicates that "available scientific evidence of the discrete population segment's importance" will be considered in finding significance, but does not specify the *best* available scientific evidence.

If a species is found to be both discrete and significant, then its status is reviewed to see whether it is endangered or threatened. A DPS species is reviewed to determine whether it should be listed under exactly the same procedures as any other listing. The listing determination is to be based solely on the "best scientific and commercial data available."<sup>42</sup>

## **Pros and Cons of DPSs**

Agency efficiency and focus were two intended benefits of DPSs, according to the Policy. The Policy said determining DPSs will "concentrate ... efforts toward the conservation of biological resources at risk of extinction."<sup>43</sup> The Policy suggested the practice of using DPSs could help endangered species by focusing on smaller groups:

This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an entire species or subspecies. The Services' [FWS & the National Marine Fisheries Service's] ability to address local issues (without the need to list, recover, and consult rangewide) will result in a more effective program.<sup>44</sup>

FWS has followed Congress's admonition to apply the practice "sparingly." According to the most recent list compiled by FWS, only 47 of the 375 vertebrates within the United States listed under the ESA are DPSs.<sup>45</sup>

Some have criticized using DPSs to remove ESA protections from certain segments of a listed species rather than using it to protect species. They argue that a DPS is created to remove ESA protections, rather than to protect those portions of a species in greatest need. In four cases, the listing classification of DPSs appears to be used solely to remove animals from protected status. The DPS designation and the delisting occurred on the same day in the same Federal Register notice. Two of the four instances are for gray wolf DPSs. The four cases are:

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<sup>41</sup> 61 Fed. Reg. at 4724.

<sup>42</sup> ESA § 4(b); 16 U.S.C. § 1533(b).

<sup>43</sup> 61 Fed. Reg. at 4725.

<sup>44</sup> 61 Fed. Reg. at 4725.

<sup>45</sup> The list, dated December 16, 2010, is available from the authors. This list includes the Sonoran Population of the Bald Eagle, even though its DPS status was ended by a court on September 30, 2010. *Center for Biological Diversity v. Salazar*, 2010 WL 3924069 (D. Ariz. September 30, 2010). See also 75 Fed. Reg. 8610 (February 25, 2010) (publishing FWS determination that a DPS designation was not justified).

- Columbian white-tailed deer, Douglas Co. DPS—July 24, 2003;
- Gray wolf, Western Great Lakes DPS—February 8, 2007;<sup>46</sup>
- Grizzly bear, Yellowstone DPS—March 29, 2007;<sup>47</sup>
- Gray wolf, Northern Rocky Mountain DPS—February 28, 2008.<sup>48</sup>

One district court suggested that this practice was contrary to the ESA, when it reviewed a challenge to the Western Great Lakes DPS designation and delisting.<sup>49</sup> The court said the ESA did not unambiguously allow a species to be designated as a DPS at the same time it was delisted, noting that a goal of the act was to protect species. The court vacated the designation and the delisting, and remanded the matter to FWS.

In other examples, the species has become downlisted (having its status dropped from endangered to threatened) the same day as being designated a DPS:

- Gray wolf, Western DPS—downlisted April 1, 2003;
- Gray wolf, Eastern DPS—downlisted April 1, 2003.

However, for many more species, the designation of a DPS increased its protection status, by protecting a group, even though the species as a whole was not covered by the act. Here are some examples:

- California bighorn sheep, Sierra Nevada DPS—listed as endangered January 3, 2000;
- Canada lynx, contiguous U.S. DPS—listed as threatened March 24, 2000;
- Atlantic salmon, Gulf of Maine DPS—listed as endangered November 17, 2000;
- Dusky gopher frog, Mississippi DPS—listed as endangered December 4, 2001;
- Pygmy rabbit, Columbia Basin DPS—listed as endangered March 5, 2003;
- California tiger salamander, Sonoma County DPS—listed as endangered March 19, 2003;
- Northern sea otter, Southwest Alaska DPS—listed as threatened August 9, 2005.

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<sup>46</sup> See *Humane Society of the United States v. Kempthorne*, 579 F. Supp. 2d 7 (D.D.C. 2008) (vacating final rule that designated and delisted the Great Lakes DPS).

<sup>47</sup> Three lawsuits challenged this final rule: two in the District Court of Idaho and one in the District Court of Montana. The Montana court vacated the DPS designation. *Greater Yellowstone Coalition v. Servheen*, 672 F. Supp. 2d 1105 (D. Mont. 2009). It is being appealed by FWS. One Idaho case was stayed pending that appeal: *Aland v. Kempthorne*, No. CV08-24-S-EJL, 2010 WL 3735490 (D. Idaho September 16, 2010). See also *Western Watersheds Project v. Servheen*, No. 07-CV-243-EJL (D. Idaho).

<sup>48</sup> The Northern Rockies DPS was later vacated by FWS. See *Defenders of Wildlife v. Hall*, 08-cv-56-M-DWM (D. Mont. filed September 22, 2008).

<sup>49</sup> *Humane Society of the United States v. Kempthorne*, 579 F. Supp. 2d 7 (D.D.C. 2008).

## Gray Wolf DPSs

The gray wolf was originally listed at the species level in two populations: the Minnesota population (threatened), and the remainder of the lower 48 states (endangered). This listing predates the Policy. Since the issuance of the Policy, FWS has pursued dividing the gray wolf into more DPSs.<sup>50</sup> These DPSs are considered to supplant the experimental populations, and when the DPSs were nullified, the Ex Pop status returned. All designations were challenged in federal court (the lawsuits will be discussed later in this report), and each court rejected FWS's action. In 2003 FWS divided wolves into three DPSs: Western, Eastern and Southwestern.<sup>51</sup> This rulemaking then downlisted the Eastern and Western DPSs from *endangered* to *threatened* under the ESA. At the same time, gray wolves were removed from protection in all or parts of 16 southern and eastern states where they did not occur historically. This rulemaking was vacated by two federal courts, returning the wolves to two populations: threatened in Minnesota, and endangered throughout the rest of the conterminous United States.

## Northern Rockies and Western Great Lakes DPSs

After the 2003 DPS rulemaking was nullified, two other DPSs of the gray wolf were proposed: Northern Rocky Mountains and Western Great Lakes.<sup>52</sup> The Western Great Lakes population was declared a distinct population segment in 2007, and delisted at the same time.<sup>53</sup> That final rule was vacated by the District Court for the District of Columbia.<sup>54</sup> On the same date as the Western Great Lakes rule, FWS proposed designating the Northern Rocky Mountain DPS and delisting the population (see **Figure 3**), except for the population in Wyoming because Wyoming's state laws were found not to provide enough protection for the wolf.<sup>55</sup> The Northern Rocky Mountain DPS, including Wyoming, was designated and delisted in 2008.<sup>56</sup> Following litigation, in September 2008, FWS voluntarily vacated the determination that both designated the Northern Rockies DPS and delisted it, returning wolves in that area to the list of threatened species as Ex Pops.<sup>57</sup>

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<sup>50</sup> Efforts to name the wolves of the Alexander Archipelago in Alaska as threatened or endangered have not succeeded. See Biodiversity Legal Foundation v. Babbitt, 943 F. Supp. 23 (D.D.C. 1996) (remanding the decision not to list the Alexander Archipelago gray wolf to DOI, as its decision was not based solely on the best scientific and commercial data); 62 Fed. Reg. 46709 (September 4, 1997) (upon remand, no finding that the wolf was threatened).

<sup>51</sup> 68 Fed. Reg. 15803 (April 1, 2003). This rule was vacated by court order. See Defenders of Wildlife v. U.S. Dept. of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005).

<sup>52</sup> The Northern Rocky Mountain DPS includes Washington, Oregon, Utah, Montana, Idaho, and Wyoming; the Western Great Lakes DPS includes North Dakota, South Dakota, Minnesota, Wisconsin, and Michigan.

<sup>53</sup> 72 Fed. Reg. 6052 (February 8, 2007).

<sup>54</sup> Humane Society of the United States v. Kempthorne, 579 F. Supp. 2d 7 (D.D.C. 2008).

<sup>55</sup> 72 Fed. Reg. 6106 (February 8, 2007). In 2006 FWS had found the petition to designate the Northern Rockies DPS and delist that segment was unwarranted, due to Wyoming's inadequate management plan. 71 Fed. Reg. 43410 (August 1, 2006).

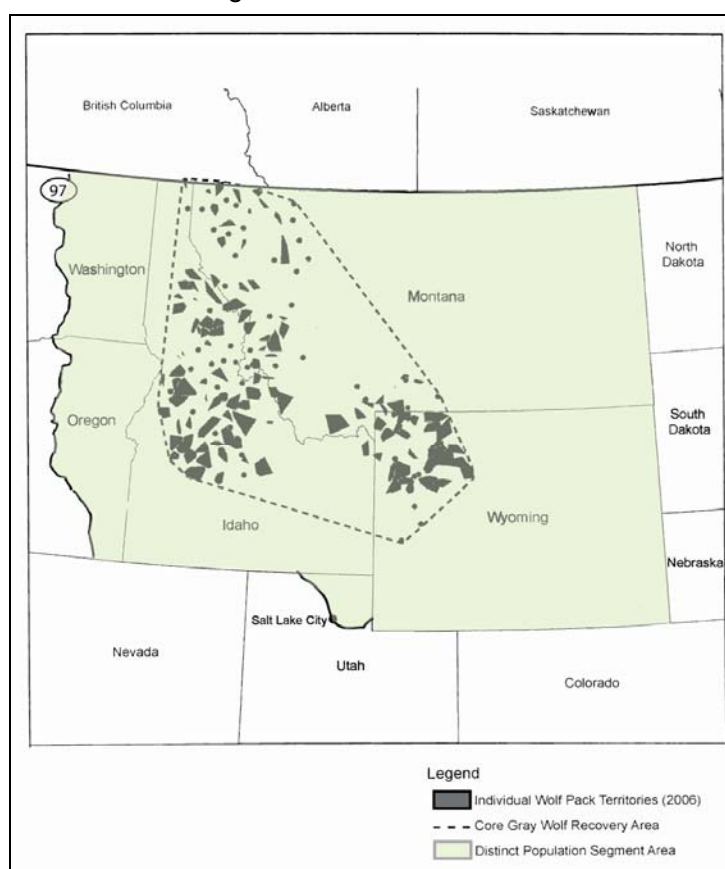
<sup>56</sup> 73 Fed. Reg. 10514 (February 27, 2008).

<sup>57</sup> Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160 (D. Mont. July 18, 2008) (granting a preliminary injunction of the delisting finding the plaintiffs were likely to win at trial); Defenders of Wildlife v. Hall, cv-08-56-M-DWM (D. Mont. September 22, 2008) (FWS motion for voluntary remand and vacatur); 73 Fed. Reg. 75356 (December 11, 2008) (reinstating gray wolves as endangered, except in Minnesota (threatened), and in the Northern Rocky Mountains (nonessential experimental populations)).

FWS changed that status in April 2009, when the wolves in both the Western Great Lakes and the Northern Rockies were again each designated a DPS and delisted with the exception of wolves in Wyoming.<sup>58</sup> Suit was filed regarding the Western Great Lakes delisting, and was settled in September 2009.<sup>59</sup> FWS reinstated the gray wolf as endangered throughout most of the area and as threatened in Minnesota.<sup>60</sup>

The Northern Rockies delisting was vacated by a court in August 2010.<sup>61</sup> (Details of the case can be found in “Litigation Regarding the Northern Rocky Mountain DPS” below.) Following the August 2010 ruling, the wolves in the Northern Rockies returned to their Ex Pop status of threatened.

**Figure 3. Northern Rocky Mountain Gray Wolf DPS Area**  
Showing Individual Wolf Pack Territories



**Source:** 73 Fed. Reg. 10517 (February 27, 2008).

**Note:** This distribution of territories can be expected to change over time.

<sup>58</sup> 74 Fed. Reg. 15069 (April 2, 2009) (Western Great Lakes); 74 Fed. Reg. 15123 (April 2, 2009) (Northern Rockies).

<sup>59</sup> Humane Society of the United States v. Salazar, 1:09-CV-1092-PLF (D.D.C.).

<sup>60</sup> 74 Fed. Reg. 47483 (September 16, 2009).

<sup>61</sup> Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. 2010).

## **Eastern DPS**

Although the Eastern DPS was rejected by a court and has not been sought by FWS since then, some observers would argue that there should be a third DPS. Wolf sightings in Northern New York and New England are very rare, but those animals could represent a portion of a DPS that extends into Canada; this would entitle them to their own recovery plan.<sup>62</sup>

Northeast wolf designation hinges on a taxonomic assessment that the language of the ESA elevates far beyond an academic debate between lumpers and splitters. Currently, FWS considers the wolves (if any) in that area to be part of the group of all wolves in the lower 48 states not listed as an Ex Pop, meaning they are protected as endangered.

## **Litigation Regarding the 2003 Designation of Western, Eastern, and Southwestern DPSs**

The 2003 rule designating three DPSs of the gray wolf (Western, Eastern, and Southwestern), downlisting the Western and Eastern DPSs, keeping the Southwestern DPS as endangered, and delisting the wolf in the Southeast was challenged in two federal district courts. The plaintiffs before the District Court for the District of Oregon disputed how the DPS ranges were designated. They argued that FWS considered only where the wolves were currently located when determining their viability. This allowed FWS to count wolves only in the areas they occupied. However, areas outside of the wolves' current range were suitable habitat, according to FWS, although no wolves were present, but FWS did not include those areas in defining the DPS ranges. The plaintiffs argued that this method was contrary to the ESA and prior case law, because the act requires that a species is endangered if it is at risk of extinction in "all or a significant portion of its range." The court agreed that FWS had violated the ESA by equating the wolves' current range with a "significant portion of its range."<sup>63</sup> The court vacated the rule, effectively eliminating the three DPSs and reinstating their protected status.

The other suit was before the District Court for the District of Vermont, which issued a decision eight months after the Oregon court. The plaintiffs in Vermont challenged the final rule's designation of an Eastern DPS, which changed the proposed rule's two DPSs for that area: a Northeast DPS and a Western Great Lakes DPS. The court found procedural flaws and also that FWS failed to consider the "significant portion of its range" in a way consistent with the ESA.<sup>64</sup> The court criticized FWS's method before vacating the rule: "The FWS simply cannot downlist or delist an area that it previously determined warrants an endangered listing because it 'lumps together' a core population with a low to non-existent population outside of the core area."<sup>65</sup>

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<sup>62</sup> See 72 Fed. Reg. 6051-103 (February 8, 2007) for a discussion of wolf recovery goals, including goals for establishing additional populations of the Western Great Lakes DPS.

<sup>63</sup> *Defenders of Wildlife v. U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005).

<sup>64</sup> *National Wildlife Federation v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005). FWS has since changed its interpretation of a "significant portion of its range." See DOI Solicitor's Opinion, M-37013 (March 16, 2007), available at <http://www.doi.gov/solicitor/M37013.pdf>.

<sup>65</sup> *National Wildlife Federation v. Norton*, 386 F. Supp. 2d at 556.



## Litigation Regarding the Northern Rocky Mountain DPS

Each effort to delist the Northern Rocky Mountain DPS has been met with litigation, with the rule being vacated. In July 2008 the District Court for the District of Montana issued a preliminary injunction halting the effectiveness of the FWS delisting of the Northern Rockies DPS.<sup>66</sup> The delisting had found that Wyoming, Idaho, and Montana had adequate wildlife management programs to support populations above recovery levels.<sup>67</sup> The July order rejected FWS's contention that there was genetic exchange between the Yellowstone experimental population and the Northern Rockies animals. (**Figure 3** shows the distribution of wolf packs in the two areas in 2008.) Without sufficient genetic exchange, the isolated wolf populations would not be genetically diverse enough to avoid inbreeding, and therefore could not be termed "recovered." The court also found that the states' management plans did not seem adequate to support wolf recovery levels. The order reinstated the wolf as endangered until final disposition. In September 2008, FWS voluntarily moved to withdraw the final rule that both designated the Northern Rockies DPS and declared it recovered.<sup>68</sup> Wolves in that area returned to being nonessential experimental populations with special regulations allowing takes.<sup>69</sup>

In January 2009, FWS announced that it planned to delist the Northern Rockies population, with the exception of wolves found in Wyoming.<sup>70</sup> (See below at "Section 4(d) Rules for Yellowstone and Idaho Experimental Populations.") A final rule was issued in April 2009.<sup>71</sup> The Wyoming population was not delisted under this rule because FWS found that Wyoming's regulatory framework to allow killing wolves would not maintain the targeted population goals to ensure genetic health for a viable population in the foreseeable future.<sup>72</sup> That rule was declared invalid by the U.S. District Court for Montana in August 2010.<sup>73</sup> The court held that segregating the Wyoming wolves from the rest of the Northern Rockies DPS violated the ESA by creating a regulatory taxonomic category other than what the act allowed. While the ESA permits listing species and segments of those species under the DPS designation, it does not allow listing (or delisting) part of a DPS, which was what the court found FWS had done regarding the wolves found in Wyoming. The wolves were returned to their status as an experimental population and again treated as threatened.

The state of Wyoming sued FWS for finding its regulatory plan did not meet recovery goals for the wolf. The District Court for Wyoming held that FWS had acted arbitrarily and capriciously in finding that the Wyoming plan should have designated all parts of the state as trophy-game areas, meaning a permit was required for killing a wolf.<sup>74</sup> Instead, the state plan designated over 90% of the state, not including National Parks, as predator areas, meaning no permit was required to kill a wolf, and required the state to maintain no fewer than seven packs outside of National Parks. The

<sup>66</sup> *Defenders of Wildlife v. Hall*, 08-cv-56-M-DWM, 2008 U.S. Dist. LEXIS 55071 (D. Mont. July 18, 2008).

<sup>67</sup> 73 Fed. Reg. 10514 (February 27, 2008).

<sup>68</sup> *Defenders of Wildlife v. Hall*, 08-cv-56-M-DWM (D. Mont. filed September 22, 2008).

<sup>69</sup> 73 Fed. Reg. 75356 (December 11, 2008).

<sup>70</sup> See FWS Press Release, "Service Removes Western Great Lakes, Portion of Northern Rocky Mountain Gray Wolf Populations from Endangered Species List" (January 14, 2009), available at <http://www.fws.gov/news/NewsReleases>.

<sup>71</sup> 74 Fed. Reg. 15123 (April 2, 2009).

<sup>72</sup> 74 Fed. Reg. at 15125.

<sup>73</sup> *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

<sup>74</sup> *Wyoming v. U.S. Department of the Interior*, No. 09-CV-118J, 2010 U.S. Dist. LEXIS 122829 (D. Mont. November 18, 2010).

court remanded to FWS to see if the Wyoming plan would not meet the federal recovery goals of 15 packs in the state and genetic diversity.

Another lawsuit claims FWS has failed to conduct five year reviews of the gray wolf as required under Section 1533(c)(2).<sup>75</sup> Five year reviews are required to see if delisting or downlisting is appropriate. In the past five years, FWS has twice conducted rulemaking to delist the wolf. If successful, the suit would force FWS to perform a five year review, perhaps taking resources away from its efforts to delist the wolf. Despite what could be viewed as a pro-environmental position (by taking resources away from delisting efforts), the suit was brought on behalf of cattle ranchers in Washington.

## **Litigation Regarding the Western Great Lakes DPS**

In September 2008 the District Court for the District of Columbia vacated the final rule that designated the Western Great Lakes gray wolf as a DPS and delisted that DPS.<sup>76</sup> Unlike the holding in the Northern Rockies DPS case, this decision focused on the procedure, not the science, behind the designation and delisting rule. The plaintiffs claimed that FWS had violated the act by issuing the designation and delisting simultaneously. FWS argued that the ESA “unambiguously” supported its rulemaking. The court found the ESA was not unambiguous, in light of the act’s purpose in conserving species. The action was remanded to the agency to find a “reasonable explanation” for its interpretation that the ESA supports its designation/delisting rule.<sup>77</sup>

FWS reinstated the Western Great Lakes DPS as an endangered species in December 2008.<sup>78</sup> In January 2009, FWS announced it was delisting the DPS,<sup>79</sup> but the rulemaking was halted.<sup>80</sup> FWS announced delisting in April 2009,<sup>81</sup> and the Humane Society of the United States filed suit. The parties settled,<sup>82</sup> whereupon FWS withdrew the delisting and reinstated the Western Great Lakes population to its dual listing status: endangered, except for in Minnesota, where the wolves are listed as threatened.<sup>83</sup>

## **Litigation Summary**

As a result of regulatory listings and court nullifications, wolves in the United States have been listed in all of the available categories for a vertebrate species: (1) never listed (Alaska); (2)

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<sup>75</sup> Washington Cattlemen’s Association v. Salazar, 11-cv-03019 (E.D. Wash. *complaint filed* February 16, 2011).

<sup>76</sup> Humane Society of the United States v. Kempthorne, 579 F. Supp. 2d 7 (D.D.C. 2008). As a result of this ruling, wolves in that area were returned to the endangered species list, except for Minnesota wolves, which are listed as threatened.

<sup>77</sup> Humane Society of the United States v. Kempthorne, 579 F. Supp. 2d 7, \*20 (D.D.C. 2008).

<sup>78</sup> 73 Fed. Reg. 75356 (December 11, 2008).

<sup>79</sup> See FWS Press Release, “Service Removes Western Great Lakes, Portion of Northern Rocky Mountain Gray Wolf Populations from Endangered Species List” (January 14, 2009), available at <http://www.fws.gov/news/NewsReleases>.

<sup>80</sup> See Rahm Emanuel, *Memorandum for the Heads of Executive Departments and Agencies* (January 20, 2009), available at <http://ombwatch.org/regs/midnightregfreezememo.pdf>.

<sup>81</sup> 74 Fed. Reg. 15069 (April 2, 2009).

<sup>82</sup> Humane Society of the United States v. Salazar, Civ. No. 09-1092 (D.D.C. July 2, 2009).

<sup>83</sup> 74 Fed. Reg. 47483 (September 16, 2009).

delisted (the DPSs described above); (3) experimental (Southwest; Yellowstone and Central Idaho); (4) threatened (Minnesota); and (5) endangered (every wolf that was not in a DPS, experimental population, or in Minnesota).

## Section 4(d) Rules

Special rules may be issued for species, distinct population segments, or experimental populations, when designated as threatened, rather than endangered. (Endangered species have protections that are expressly stated in the act.) Under Section 4(d) of the ESA, FWS may decide how the protections of the act related to *taking*, or harming of the threatened species, are applied. These regulations are called *Section 4(d) rules* or *special rules*. A DPS is treated like a species under the act; therefore, the special regulation provision also applies to threatened DPSs. Under Section 10(j)(3)(C), experimental populations are treated as threatened species, and so are also covered under this provision. Special rules provide customized protection that FWS deems necessary and advisable for the species' conservation. FWS is not limited in determining the protections and can allow the full range of protections in the act to threatened species. The special rules are promulgated in Title 50 (Part 17) of the Code of Federal Regulations.

## Section 4(d) Rules for Gray Wolves

According to FWS, Section 4(d) rules are intended to reduce conflicts between the provisions of the act and needs of people near the areas occupied by the species. This type of special rule has been in effect for the threatened gray wolves in Minnesota for many years, and was extended to gray wolves in other states, when and where the wolf was downlisted. Under the rule for Minnesota, individual wolves that have preyed on domestic animals can be killed by designated government agents. FWS asserts that this rule avoids even larger numbers of wolves being killed by private citizens who otherwise might take wolf control into their own hands.<sup>84</sup>

In 2003, as part of the rulemaking that was vacated, FWS issued Section 4(d) rules for two DPSs: Eastern and Western. The special rules would have allowed individuals to kill Western DPS wolves in the act of attacking livestock on private land, and to harass wolves near livestock. Permits to kill wolves could also be issued to landowners who showed wolves routinely were present and formed a significant risk to livestock. FWS said that, as in Minnesota, the rule would “increase human tolerance of wolves in order to enhance the survival and recovery of the wolf population.”<sup>85</sup> Michigan and Wisconsin citizens would be able to kill any wolf within one mile of killed livestock, and in other Eastern states beside Minnesota, any lethal measures could be used within four miles of such a site.<sup>86</sup> This rule was vacated, as discussed earlier in “Litigation Regarding the 2003 Designation of Western, Eastern, and Southwestern DPSs.” When FWS settled the case challenging the 2009 delisting of the Western Great Lakes DPS, the special regulations were put back into effect.<sup>87</sup>

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<sup>84</sup> 50 C.F.R. § 17.40(d).

<sup>85</sup> 68 Fed. Reg. at 15864.

<sup>86</sup> 68 Fed. Reg. at 15868.

<sup>87</sup> 74 Fed. Reg. 47483 (September 16, 2009).

## Section 4(d) Rules for Yellowstone and Idaho Experimental Populations

In 2005, after FWS found that the wolf population had exceeded its minimum goals of 30 breeding pairs for Yellowstone and Central Idaho, it issued a rule to manage wolves where they had an *unacceptable impact* on ungulate populations.<sup>88</sup> This 2005 Rule modified the provisions put in effect when the wolves were first introduced, which stated that “wolves could not be deliberately killed solely to resolve predation conflicts with big game.”<sup>89</sup> The 2005 Rule allowed States and Tribes in the area to kill wolves where it was shown they were adversely affecting the populations of deer, antelope, elk, big horn sheep, mountain goats, bison, or moose in the area. Before the states and tribes could act, they were required to submit the plan for peer review, public comment, and FWS approval. Data at the time, from many sources cited by FWS, showed that wolf predation was “unlikely to be the primary cause of a reduction of any ungulate herd or population in Idaho, Wyoming, or Montana.”<sup>90</sup> FWS reported that more wolves were killed in 2007 and 2008 than were cattle.<sup>91</sup> In 2009, the wolf population in the area was estimated at 1,706.<sup>92</sup>

In 2008 FWS changed the special rule.<sup>93</sup> FWS determined that the definition of *unacceptable impact* had to be altered, as wolves were not the primary cause in ungulate population decreases. Accordingly, the definition was modified to mean: “Impact to a wild ungulate population or herd where a State or Tribe has determined that wolves are one of the major causes of the population or herd not meeting established State or Tribal population or herd management goals.”<sup>94</sup> Public and peer reviews are still required. The plan allows a state to kill wolves, provided the experimental population does not go below 20 breeding pairs in the state.<sup>95</sup>

The 2008 Rule also expands the provision for killing wolves when they are in the act of attacking livestock or dogs. The 2005 Rule allowed an individual to “take” a wolf that was in the act of attacking stock animals or dogs on private property. The 2008 Rule allows individuals to take wolves that are in the act of attacking livestock or dogs on public lands as well, except for

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<sup>88</sup> 70 Fed. Reg. 1285 (January 6, 2005) (hereinafter the “2005 Rule”). *Unacceptable impact* was defined as “State or Tribally-determined decline in a wild ungulate population or herd, primarily caused by wolf predation, so that the population or herd is not meeting established State or Tribal management goals.” *Id.* at 1307.

<sup>89</sup> 59 Fed. Reg. 60252, 60255 (November 22, 1994) (Yellowstone); 59 Fed. Reg. at 60272 (Idaho) (“wolves will not be deliberately killed solely to address ungulate-wolf conflicts”).

<sup>90</sup> See 2008 Rule, pp. 6-7, citing Bangs, *et al.* 2004, pp. 89-100; National Research Council 1997, pp. 185-186; Mech and Peterson 2003, p. 159; Pletscher *et al.* 1991, pp. 545-548.

<sup>91</sup> 73 Fed. Reg. at 63928 (October 28, 2008) (reporting that in 2007, 112 cattle were killed by wolves, and 135 depredating wolves were killed; in 2008, 170 cattle killed by wolves and 172 depredating wolves killed).

<sup>92</sup> 73 Fed. Reg. at 63923 (October 28, 2008) (up from 1,463 in 2008, and 1,544 wolves in 2007).

<sup>93</sup> Revision of Special Regulation for the Central Idaho and Yellowstone Area Nonessential Experimental Populations of Gray Wolves in the Northern Rocky Mountains (hereinafter the “2008 Rule”). 73 Fed. Reg. 4720 (January 28, 2008). See also 73 Fed. Reg. 75356 (December 11, 2008) (reinstating the special rules).

<sup>94</sup> 2008 Rule, p. 8.

<sup>95</sup> According to FWS, at the time of the 2008 Rule, Montana had 394 wolves, including 37 breeding pairs; Idaho had 788 wolves, including 41 breeding pairs; and Wyoming had 362 wolves, including 27 breeding pairs. 2008 Rule, p. 11.

National Park Service property.<sup>96</sup> When the 2009 delisting of the Northern Rockies DPS was invalidated by a court, FWS reinstated the special rules regarding the Ex Pops in the area.<sup>97</sup>

In February 2011, FWS proposed to allow Idaho to kill some wolves across five years to help the elk population rebound.<sup>98</sup> The rule would modify the special rules for Ex Pops.

## Legislation

Following successive court orders invalidating the delisting rules, and in light of the increasingly larger populations of wolves in some parts of the country, the 111<sup>th</sup> Congress began to consider legislative options to exclude the wolf from the protections of the ESA. The 112<sup>th</sup> Congress has also introduced legislation. Prior to 2010, legislative efforts regarding listing of any species were extremely rare and never successful.<sup>99</sup> Listing and delisting typically are a regulatory responsibility.

The bills of the 112<sup>th</sup> Congress take different approaches regarding the wolf. H.R. 509 (Rehberg) and S. 249 (Hatch) would amend the ESA to say that the act does not apply to the gray wolf. Those bills would affect all gray wolves, regardless of location, which would include the populations in the Southwest as well as the Western Great Lakes and Northern Rockies areas.

H.R. 510 (Rehberg) addresses wolves in just two states: Idaho and Montana. It would set up state regulation of the wolf, allowing those states to impose their own regulatory schemes, including continuing protections at the same levels as the ESA. It is less clear how H.R. 510 would affect existing federal protection. It says “Any wolf in Idaho or Montana shall not be treated under any status of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), including as an endangered species, a threatened species, an essential experimental population, or a nonessential experimental population.” Presumably, it is meant that the wolves shall not be treated as protected under or covered by the ESA, regardless of their status.

The Simpson amendment to the Continuing Resolution of 2011 (H.R. 1, § 1713) would direct FWS to reissue the 2009 final rule establishing a Northern Rocky Mountain DPS and delisting the wolf except in Wyoming. The bill bars judicial review of the rule, but would still allow regulatory actions, such as delisting in Wyoming, or relisting of the DPS, should the wolf’s status change.

The bills of the 111<sup>th</sup> Congress took many shapes. Two bills would have stricken the gray wolf from most ESA protections—H.R. 6028 (Edwards—Texas) and H.R. 6485 (Bishop—Utah). Other bills would have had a more limited application. H.R. 6486 (Bishop—Utah) would have prevented gray wolf listings (including DPS listings) from applying in the state of Utah. The proposed State Wolf Management Act, S. 3825 (Risch), attempted to end protection for *covered*

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<sup>96</sup> 2008 Rule, pp. 15-16.

<sup>97</sup> 75 Fed. Reg. 65574 (October 16, 2010).

<sup>98</sup> 76 Fed. Reg. 7875 (February 11, 2011) (Notice of an environmental assessment with the preferred alternative to reduce the approximately 76 wolves in the Lolo Elk Management Zone to 20-30 wolves for five years).

<sup>99</sup> All examples were from the 100<sup>th</sup> Congress and were proposed amendments to the Endangered Species Act Amendments of 1987. They were not passed. See 133 Cong. Rec. H. 11248 (proposed amendment to prevent the Concho water snake from being considered a listed species); 133 Cong. Rec. H. 11248 (proposed amendment to prevent the gray wolf from being considered a listed species); and 133 Cong. Rec. H. 11617 (proposed amendment to prevent the leopard darter minnow from being considered a listed species).

wolves, defined as those that were part of “the distinct population segment of the Rocky Mountain gray wolf,” which does not exist. It would have allowed relisting if gray wolf populations decreased to less than one-tenth of their current size (10 breeding pairs or 100 wolves) after five years.<sup>100</sup>

A different Senate bill, S. 3864 (Baucus), the Restoring State Wildlife Management Act of 2010, would have applied to wolves in Idaho and Montana, allowing delisting in those states if the Secretary of the Interior approved the states’ management plans. As written, however, it may not have affected the nonessential Ex Pops that make up most of those states’ wolves. The bill states that inclusion of “the Rocky Mountain gray wolf on any list of protected species under Section 4(c) of the ESA”<sup>101</sup> would have no force or effect. However, Ex Pops are listed under Section 10(j) of the ESA, not Section 4.

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<sup>100</sup> FWS estimated the number of gray wolves in 2008 to be 1,639 (491 in Montana; 846 in Idaho; 302 in Wyoming) in 95 breeding pairs. 74 Fed. Reg. 15123 (April 2, 2009).

<sup>101</sup> The bill refers to the Endangered Species Act Section 4 as 7 U.S.C. § 1533, but it is codified under 16 U.S.C. § 1533.