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PIECEMEAL DELISTING: DESIGNATING DISTINCT POPULATION SEGMENTS FOR THE PURPOSE OF DELISTING GRAY WOLF POPULATIONS IS ARBITRARY AND CAPRICIOUS

Nicole M. Tadano

Abstract: The Endangered Species Act (ESA) protects species that are in danger of extinction “throughout all or a significant portion of its range.” After thirty-three years of protection by the ESA, the gray wolf is gradually recovering from the brink of extinction. Pressure to remove protections for existing gray wolf populations has mounted as human interests have increasingly conflicted with the gray wolf’s resurgence. Most courts have defined the phrase “significant portion of its range” in the ESA to mean the historical range of a species. This interpretation is consistent with the legislative history of the ESA and the historical listing practices of the United States Fish and Wildlife Service (FWS). However, the FWS has recently designated and delisted discrete and significant gray wolf populations—termed “Distinct Population Segments” (DPSs)—based on the gray wolf’s current range. This Comment argues that the FWS’s action of designating and delisting these gray wolf DPSs is contrary to the ESA. By limiting the delisting analysis to the area within the DPS boundaries, the FWS circumvents the statutory requirement to assess threats to the gray wolf throughout its historical range. Moreover, this action does not comport with the DPS Policy promulgated by the FWS and National Oceanic and Atmospheric Administration (NOAA) Fisheries. Therefore the FWS’s action of designating and delisting these gray wolf DPSs is arbitrary and capricious.

The Endangered Species Act (ESA) provides substantial protection to species listed as threatened or endangered under the Act.¹ However, local residents may carry negative attitudes toward listed species, arising from both real and perceived restrictions on private activity under the ESA.² Listed predators may receive especially hostile treatment from local communities.³ Critics have also noted the low number of recovered

1. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2000).

2. See, e.g., Richard P. Reading & Stephen R. Kellert, *Attitudes Toward a Proposed Reintroduction of Black-Footed Ferrets (Mustela nigripes)*, 7 CONSERVATION BIOLOGY 569, 571 (1993) (discussing local community perceptions of the ESA and listed species); Erik Stokstad, *What’s Wrong With the Endangered Species Act?* 309 SCIENCE 2150, 2151 (2005) (“As of this month, FWS was engaged in 61 lawsuits related to various aspects of the listing process.”).

3. *Id.*; see also Mitch Tobin, *Reintroduced Gray Wolves Fighting Tooth and Nail*, ARIZ. DAILY STAR, Nov. 28, 2004, at A1, available at <http://www.azstarnet.com/sn/environment/50132.php> (“Illegal shooting has claimed at least 20 wolves since reintroduction began in the Southwest in 1998, and bullets remain the No. 1 killer of wolves along the Arizona-New Mexico border.”); ROBERT C. BELDEN & JAMES W. MCCOWN, FLA. GAME AND FRESH WATER FISH COMM’N, FLORIDA PANTHER REINTRODUCTION FEASIBILITY STUDY 13–14 (1996) (noting opposition of residents living closest to reintroduction site).

species and have argued that the ESA's benefits do not outweigh the societal costs.⁴ As a result, once a species appears to recover, the United States Fish and Wildlife Service (FWS) may face significant pressure from residents in recovery areas to delist the species and remove ESA protections.⁵

The FWS has sought to address these criticisms by increasingly emphasizing recovery and delisting.⁶ This new emphasis has resulted in the delisting of several species in recent years,⁷ including the delisting of gray wolf distinct population segments (DPSs), which are discrete and significant populations of the endangered gray wolf.⁸ On February 8, 2007, the FWS published a Proposed Rule that simultaneously designated the Northern Rocky Mountain Population of gray wolves as a DPS and delisted it.⁹ The FWS also published a Final Rule that simultaneously designated the Western Great Lakes population of gray wolves as a DPS and delisted it.¹⁰

This Comment argues that the FWS's designation and delisting of the Northern Rocky Mountain DPS and the Western Great Lakes DPS is arbitrary and capricious. These latest delisting efforts manipulate the definition of "significant portion of its range"¹¹ and limit the delisting analysis to the gray wolf's current range rather than the historical

4. See Holly Doremus & Joel E. Pagel, *Why Listing May Be Forever: Perspectives on Delisting under the U.S. Endangered Species Act*, 15 CONSERVATION BIOLOGY 1258, 1260 (2001).

5. See, e.g., Endangered and Threatened Wildlife and Plants; Final Rule To Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray-Wolves; Final and Proposed Rules, 68 Fed. Reg. 15,804, 15,807 (Apr. 1, 2003) [hereinafter *2003 Final Rule*] ("We have received several petitions during the past decade requesting consideration to delist the gray wolf . . .").

6. Doremus, *supra* note 4, at 1259–60.

7. *Id.*

8. Endangered and Threatened Wildlife and Plants; Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife; Proposed Rule, 72 Fed. Reg. 6106 (proposed Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17) [hereinafter *2007 NRM Proposed Rule*]; Endangered and Threatened Wildlife and Plants; Final Rule Designating the Western Great Lakes Populations of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf From the List of Endangered and Threatened Wildlife; Final Rule, 72 Fed. Reg. 6052 (Feb. 8, 2007) (to be codified at 50 C.F.R. pt. 17) [hereinafter *2007 WGL Final Rule*].

9. *2007 NRM Proposed Rule*, *supra* note 8.

10. *2007 WGL Final Rule*, *supra* note 8.

11. 16 U.S.C. § 1532 (6), (20) (2000).

range.¹² This tactic circumvents the statutory requirement that the FWS comprehensively assess the species' historical range in its delisting decision,¹³ and is also contrary to the purpose of the Services' DPS Policy.¹⁴ The delisting of the Northern Rocky Mountain DPS and the Western Great Lakes DPS is therefore arbitrary and capricious.

Part I of this Comment introduces the history and success of gray wolf recovery under the ESA, as well as recent delisting efforts. Part II outlines the basic statutory framework of the ESA's listing process, focusing on section 4 and its listing and delisting requirements. Part III discusses the interpretation of the statutory phrase "significant portion of its range." Part IV analyzes case law holding DPS designations that bypass the ESA's statutory requirements to be arbitrary and capricious. Part V describes the recent proposals by the FWS to incrementally designate and delist populations of the gray wolf. Finally, Part VI argues that the designation and delisting of gray wolf DPSs without conducting a section 4 analysis throughout the gray wolf's historical range is arbitrary and capricious.

I. THE RECOVERY OF THE GRAY WOLF AND CURRENT DELISTING EFFORTS

The gray wolf once occupied most of the coterminous United States.¹⁵ However, by the time Congress enacted the ESA the gray wolf was extirpated from nearly all of its historical range in the lower forty-eight states.¹⁶ Efforts to protect this species began in 1974, when the FWS listed four subspecies of gray wolf as endangered: the northern Rocky Mountain gray wolf (*Canis lupus irremotus*), the eastern timber wolf (*C. l. lycaon*) in the northern Great Lakes region, the Mexican wolf (*C. l.*

12. See *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005); *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1167 (D. Or. 2005) (*Defenders III*) (citing *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001) (*Defenders I*)).

13. See 16 U.S.C. §1533(a); *id.* § 1532(6), (20); *Defenders I*, 258 F.3d at 1145.

14. See Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996) [hereinafter *DPS Policy*].

15. Endangered and Threatened Wildlife and Plants; Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment; Removing the Western Great Lakes Distinct Population Segment of the Gray Wolf From the List of Endangered and Threatened Wildlife, 71 Fed. Reg. 15,266, 15,267 (proposed Mar. 27, 2006) (to be codified at 50 C.F.R. pt. 17) [hereinafter *2006 WGL Proposed Rule*].

16. See *id.*; *Defenders III*, 354 F. Supp. 2d at 1161 ("By the early 1970's, northern Minnesota held the only substantial wolf population.") (citing *2003 Final Rule*, *supra* note 5, at 15,805).

baileyi) in Mexico and the southwestern United States, and the Texas gray wolf (*C. l. monstrabilis*) of Texas and Mexico.¹⁷ In 1978, the FWS reclassified the gray wolf as endangered at the species level (*C. lupus*) throughout the coterminous forty-eight States and Mexico, except for Minnesota, where the gray wolf was downlisted to threatened.¹⁸

Gray wolf restoration is one of the great success stories of the ESA.¹⁹ In 1994, the FWS initiated gray wolf reintroduction projects in central Idaho and the Greater Yellowstone Area.²⁰ In 1998, the FWS established a population of Mexican gray wolves in portions of Arizona, New Mexico, and Texas.²¹ In addition, wolf numbers in the western Great Lakes states and the Northern Rocky Mountain states steadily increased and have met the recovery goals set forth in their respective recovery plans.²² Wolf recovery advocates point to these promising numbers as proof of the ESA's success.²³

The gray wolf's recovery is not, however, universally celebrated. Many residents in the recovery areas find it difficult to reconcile gray wolf recovery with the furtherance of human interests. In particular, gray wolf movement into agricultural areas has created conflicts with humans.²⁴ Some ranchers have become frustrated by livestock and cattle predation,²⁵ while hunters blame gray wolves for low elk populations

17. Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation and Importation of Wildlife, 39 Fed. Reg. 1171 (Jan. 4, 1974); Amendments to Lists of Endangered Fish and Wildlife, 38 Fed. Reg. 14,678 (June 4, 1973); Lists of Endangered and Threatened Fauna, 40 Fed. Reg. 17,590 (Apr. 21, 1975); Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607 (Mar. 9, 1978) [hereinafter *1978 Reclassification*].

18. *1978 Reclassification*, *supra* note 17.

19. WILLIAM H. RODGERS, JR. *ENVIRONMENTAL LAW IN INDIAN COUNTRY* 808 (Thomson/West 2005).

20. *2003 Final Rule*, *supra* note 5, at 15,806. The FWS designated the reintroduced populations as nonessential experimental populations. A nonessential experimental population is a released population of a listed species that is not essential to the continued existence of the listed species. See 16 U.S.C. § 1539(j)(1)–(2)(B).

21. *2003 Final Rule*, *supra* note 5, at 15,806.

22. *Id.* at 15,810; *2007 NRM Proposed Rule*, *supra* note 8.

23. John Flesher, *U.S. Wants to End Gray Wolf Protection*, CHI. TRIB., Mar. 17, 2006, at 3 (“The wolf’s return in the Great Lakes region is one of the most remarkable turnarounds in the annals of wildlife conservation.”).

24. See L. David Mech, *The Challenge and Opportunity of Recovering Wolf Populations*, 9 CONSERVATION BIOLOGY 270, 273 (1995) [hereinafter Mech, *Challenge*].

25. Mike Stark, *Livestock Losses Leave Ranchers Worn Down by Wolves*, BILLINGS GAZETTE, May 16, 2004, available at

and poor hunts.²⁶ These citizens exert significant pressure on the FWS to delist gray wolves and turn over management of the gray wolves to the states.²⁷

The FWS has received several petitions requesting delisting of the gray wolf in all or part of the forty-eight coterminous States.²⁸ Although the FWS has not yet established a recovery plan or other benchmarks for the entire species, the agency began preparing to downlist and delist the entire species as recently as 2003.²⁹ In 2003, the FWS published a Final Rule establishing three distinct population segments (DPSs) for the gray wolf in the coterminous United States, and downlisting the conservation status of two of the three DPSs from “endangered” to “threatened.”³⁰ Two district courts reviewing the action rejected the 2003 downlisting rule.³¹ The two courts noted that the FWS attempted to reduce ESA protections over as large an area as possible by broadly designating the DPS boundaries.³² The courts held this action to be arbitrary and capricious, as it was inconsistent with the FWS’s DPS Policy and with the ESA.³³

However, the FWS has continued to designate and delist gray wolf DPSs. On February 8, 2007, the FWS published a Proposed Rule designating the Northern Rocky Mountain Population of gray wolves as a DPS and simultaneously delisting it.³⁴ The FWS also published a Final

<http://www.billinggazette.com/newdex.php?display=rednews/2004/05/16/build/state/30-wolves.inc>.

26. Rocky Barker, *Wolf Rally Draws a Crowd*, THE IDAHO STATESMAN, Jan. 12, 2007, at Main 1, available at <http://www.idahostatesman.com/273/story/67393.html>.

27. See Timothy Clark & Anne-Marie Gillesberg, *Lessons from Wolf Restoration in Greater Yellowstone*, in WOLVES AND HUMAN COMMUNITIES: BIOLOGY, POLITICS, AND ETHICS 135, 147 (Sharpe et. al. eds., Island Press 2001).

28. 2003 Final Rule, *supra* note 5, at 15,807.

29. Nat’l Wildlife Fed’n v. Norton, 386 F. Supp. 2d 553, 567 (D. Vt. 2005) (noting that FWS developed three separate recovery plans for the gray wolf—for the eastern United States, Northern Rocky Mountain States, and the southwest—instead of a national recovery plan).

30. 2003 Final Rule, *supra* note 5, at 15,804.

31. Nat’l Wildlife Fed’n, 386 F. Supp. 2d 553; Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005) (*Defenders III*).

32. See Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 564–65; *Defenders III*, 354 F. Supp. 2d at 1170–72 (noting that co-author of Final Rule commented that “a three-state Northern Rockies DPS leaves the rest of the West not delistable unless we establish additional recovered populations in the areas outside the DPS.”).

33. Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 566; *Defenders III*, 354 F. Supp. 2d at 1171–72; see *infra* notes 105–117 and accompanying text.

34. 2007 NRM Proposed Rule, *supra* note 8, at 6111–13. If Wyoming does not adequately

Rule designating the Western Great Lakes population of gray wolves as a DPS and simultaneously delisting it.³⁵ The geographic regions in this second round of DPS designations appear to be more narrowly drawn around currently existing wolf populations.³⁶ However, these DPS delistings are still arbitrary and capricious because they are contrary to the ESA.

In sum, the FWS currently faces pressure to remove ESA protections from the gray wolf.³⁷ In 2003 the FWS attempted to designate three broad DPSs for the gray wolf and downlist the conservation status of two of the three DPSs.³⁸ Although the two district courts reviewing the action rejected this downlisting attempt,³⁹ the FWS has continued to designate and delist gray wolf DPSs.⁴⁰

II. THE ESA PROTECTS SPECIES THROUGHOUT ALL OR A SIGNIFICANT PORTION OF THEIR RANGE

The Endangered Species Act of 1973 provides a means to conserve both threatened and endangered species, as well as the ecosystems upon which they depend.⁴¹ Under section 4 of the ESA, the agency charged with implementing the ESA⁴² must determine whether a species is threatened or endangered by measuring the presence of five factors throughout all or a significant portion of its range.⁴³ The term “species” within the meaning of the ESA includes both taxonomic species as well

modify its management plan, the portion of northwestern Wyoming outside the national parks necessary to support the Wyoming segment of the Northern Rocky Mountain wolf population will remain listed. *Id.*

35. See 2007 WGL Final Rule, *supra* note 8, at 6052.

36. See 2007 NRM Proposed Rule, *supra* note 8, at 6111–13; 2007 WGL Final Rule, *supra* note 8, at 6057–58.

37. See *supra* note 27 and accompanying text.

38. 2003 Final Rule, *supra* note 5, at 15,804.

39. *Nat'l Wildlife Fed'n*, 386 F. Supp. 2d 553 (D. Vt. 2005); *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) (*Defenders III*).

40. 2007 NRM Proposed Rule, *supra* note 8, at 6111–13; 2007 WGL Final Rule, *supra* note 8, at 6052.

41. 16 U.S.C. §1531(b) (2000).

42. The FWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) are responsible for implementing the ESA. See 16 U.S.C. § 1532(15).

43. See 16 U.S.C. § 1533(a)(1).

as DPSs.⁴⁴ DPS listings thus allow the agency to protect vulnerable populations of species before the entire species declines throughout its range.⁴⁵

A. The ESA Protects Species After They are Listed Under Section 4

The ESA only protects species listed as threatened or endangered. In listing a species, the agency charged with implementing the ESA (the FWS or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (together, the Services))⁴⁶ must determine whether a species is endangered or threatened throughout "all or a significant portion of its range."⁴⁷ To list a species, the agency must find that one or more of the following five factors, set forth in section 4 of the ESA, exists:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.⁴⁸

The agency must base this determination solely on the best scientific and commercial data available, while also considering any state or foreign efforts to protect the species.⁴⁹ Courts have noted that the best available scientific data requirement, as opposed to a requirement of absolute scientific certainty, reflects Congress's intent that the Services take

44. See 16 U.S.C. § 1532(16).

45. See S. REP. NO. 96-151, at 7 (1979); *DPS Policy*, *supra* note 14, at 4725.

46. See 16 U.S.C. § 1532(15) (2000). Generally, the FWS is responsible for land-based and freshwater species, while NOAA Fisheries of the Department of Commerce is responsible for marine and anadromous species. See U.S. Fish & Wildlife Service, Listing a Species as Threatened or Endangered (Dec. 2005), available at <http://www.fws.gov/endangered/listing/listing.pdf>; NOAA Fisheries, Office of Protected Resources, Species Protected Under the Endangered Species Act (ESA), <http://www.nmfs.noaa.gov/pr/species/esa/> (last visited Aug. 12, 2007).

47. 16 U.S.C. § 1533(a).

48. *Id.* § 1533(a)(1)(A)–(E).

49. See *id.* § 1533(b)(1)(A).

preventive measures *before* a species is conclusively headed for extinction.⁵⁰

Listing a species triggers several protective provisions of the ESA. For example, listed species are protected by the designation of critical habitat,⁵¹ a prohibition on takings,⁵² and a mandatory consultation process for any federal agency action that has the potential to jeopardize a listed species or damage a species' critical habitat.⁵³ The implementing agency must also develop and implement a recovery plan for each listed species, unless such a plan will not promote the conservation of the species.⁵⁴ The recovery plan must include objective, measurable delisting criteria.⁵⁵ As a species recovers, the agency may consider downlisting the status of a species from endangered to threatened, or removing the species from the list of endangered and threatened species altogether.⁵⁶ The agency considers the same five listing factors prescribed in section 4,⁵⁷ and downlists or delists the species if it has recovered to the point where it is no longer endangered or threatened throughout all or a significant portion of its range.⁵⁸

B. Under the ESA and the Services' DPS Policy, "Species" Includes both Taxonomic Species and DPSs

Under the ESA, "[t]he term 'species' includes 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."⁵⁹ Thus, the Services' authority to list a "species" as endangered or threatened extends beyond formal taxonomic terms to include subspecies and DPSs

50. See *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1275 (D.N.M. 2005) (quoting *Ctr. for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1236 (W.D. Wash. 2003)).

51. 16 U.S.C. § 1533(b)(6)(C).

52. 16 U.S.C. § 1538(a)(1). "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

53. *Id.* § 1536(a)(2).

54. See *id.* § 1533(f)(1).

55. See *id.* § 1533(f)(1)(B)(ii).

56. See *id.* § 1533(c).

57. See *id.* § 1533(a)(1); 50 C.F.R. § 424.11(d).

58. See 50 C.F.R. § 424.11(d) (a species may also be delisted if it is found that the species is extinct, or if the data for the original classification was in error).

59. 16 U.S.C. § 1532(16).

for vertebrates.⁶⁰ Congress did not define the term “distinct population segment,” but rather implicitly delegated the responsibility to the Services.⁶¹ In 1996, the Services adopted a three-part DPS Policy to clarify their interpretation of “distinct population segment.”⁶² First, the population must be discrete.⁶³ Second, the population must be biologically and ecologically significant.⁶⁴ Third, the DPS must meet the section 4 listing criteria.⁶⁵

Under the DPS Policy, the Services retain the flexibility to list, downlist,⁶⁶ or delist discrete and significant populations, even though the conservation status of other populations may differ elsewhere.⁶⁷ For example, if a distinct and significant population of an unlisted species is struggling while other populations are faring well, the FWS may designate the struggling population as a DPS and list it as endangered or threatened.⁶⁸ Once that DPS is no longer endangered or threatened, the FWS may downlist or delist it.⁶⁹

60. See *DPS Policy*, *supra* note 14.

61. See *id.* at 4722.

62. *DPS Policy*, *supra* note 14, at 4725. Although labeled as a “policy,” it has been held to be binding upon the agency. See *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (“Having chosen to promulgate the DPS Policy, the FWS must follow that policy.”).

63. *DPS Policy*, *supra* note 14, at 4725. To be discrete, a population must be either (1) “markedly separated from other populations of the same taxon” based on “physical, physiological, ecological, or behavioral factors,” or (2) “delimited by international governmental boundaries within which significant differences exist in control of exploitation, management of habitat, conservation status, or regulatory mechanisms . . .” *Id.*

64. *Id.* This significance may be established by (1) persistence of the discrete population segment in an ecological setting unusual or unique for the taxon, (2) evidence that the loss of the discrete population segment would result in a significant gap in the range of a taxon, (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range, or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics. *Id.*

65. *Id.*

66. The agency may periodically review the status of a listed species as it recovers and decide to change the species status under the ESA from endangered to threatened. See 16 U.S.C. §1533(c)(2) (2000).

67. *Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1169 (D. Or. 2005) (*Defenders III*).

68. See *id.*

69. See *id.*

C. *Statutory Amendments and the DPS Policy Provide the Services Flexibility to Protect a Species Before it Has Declined Throughout its Range*

Amendments to the ESA enabled the Services to protect a population of a species before the entire species declines to the brink of extinction.⁷⁰ In a 1973 Senate Report, Congress noted the failure of the 1969 Endangered Species Conservation Act to provide the Services the management tools necessary to act early enough to save a species.⁷¹ Congress addressed this weakness by enacting the ESA in 1973.⁷² The 1973 ESA included a new designation for species that are “threatened,”⁷³ thereby expanding the scope of the ESA to cover both threatened and endangered species. The Services could thus regulate species “before the danger [of extinction] becomes imminent.”⁷⁴

The addition of “distinct population segment” to the definition of “species” in 1978 further strengthened the ESA by allowing the Services to protect a sub-population of a larger species before it declined throughout its range.⁷⁵ In 1979, the General Accounting Office (GAO) recommended that Congress again amend the definition of “species” to prevent the agencies from listing geographically limited populations of vertebrates.⁷⁶ However, the Senate Committee on Environment and Public Works rejected the recommendation, noting that the amendment sought to correct the FWS’s inability to tailor protections for species’ populations:

The committee agrees 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 populations may be necessary when the

70. See S. REP. NO. 93-307, at 3 (1973), as reprinted in 1973 U.S.C.C.A.N. 2989, 2991; S. REP. NO. 96-151, at 7 (1979).

71. See S. REP. NO. 93-307, at 3 (1973), as reprinted in 1973 U.S.C.C.A.N. 2989, 2991.

72. See *id.*

73. See *id.*

74. See *id.* at 2992.

75. Act to amend the Endangered Species Act of 1973, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended 16 U.S.C. § 1532(16)) (addition of DPS to definition of species); S. REP. NO. 96-151, at 7 (1979).

76. S. REP. NO. 96-151, at 7 (1979).

preponderance of the evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations.⁷⁷

The 1978 addition of “distinct population segment” thus provided the Services additional flexibility in their management practices, allowing for protective actions for a population of a species even if the species still existed elsewhere.⁷⁸ Likewise, listing DPSs allows for protection when the Services identify a widespread threat to the species but only certain populations have yet demonstrated any danger of extinction.⁷⁹

The Services incorporated the reasoning articulated in the legislative history in the DPS Policy, and noted that DPS listings would allow them “to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range.”⁸⁰ The Services viewed DPS listings as an efficient method of protecting and recovering species—recovering a population would cost significantly less than recovering an entire species.⁸¹ The Services also noted that acting before the entire species declined would increase their ability to address specific local management issues, as they would not have to address the listing, recovery, and consultation issues for the species range-wide.⁸²

III. MOST COURTS INTERPRET “SIGNIFICANT PORTION OF ITS RANGE” TO MEAN A SPECIES’ HISTORICAL RANGE

Judicial deference to an agency’s interpretation of a statute does not apply where the agency’s interpretation runs contrary to the intent of Congress.⁸³ Courts look to the statute’s legislative history and the agency’s past administrative practice to determine the intent of Congress.⁸⁴ By amending the definitions of “endangered” and

77. *Id.*

78. *Id.*

79. *See id.*

80. *DPS Policy*, *supra* note 14, at 4725.

81. *Id.*; *see also* Eric Biber, *The Application of the Endangered Species Act to the Protection of Freshwater Mussels: A Case Study*, 32 ENVTL. L. 91, 144–45 (2002) (stating that by the time a species is listed, its population is so low that recovery efforts may be unable to succeed, or will take extraordinary amounts of time and money to succeed).

82. *DPS Policy*, *supra* note 14, at 4725.

83. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

84. *Id.* at 843 n.9.

“threatened” to include “significant portion of its range,” Congress expanded the ESA to provide protection for species in any portion of its range.⁸⁵ Courts, including the district courts reviewing the 2003 gray wolf downlisting rule, have looked to the ESA’s legislative history and interpreted “significant portion of its range” to mean a species’ historical range.⁸⁶ The FWS also previously interpreted the phrase to mean a species’ historical range, and listed species throughout their historic range.⁸⁷

A. Courts Give No Deference to an Agency’s Interpretation of a Statute if it is Unreasonable

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸⁸ controls judicial review of the FWS’s interpretation of the ESA.⁸⁹ In reviewing an agency’s construction of the statute it administers, the court first asks whether Congress has directly spoken to the precise question at issue.⁹⁰ If the intent of Congress is clear, the court must give effect to the unambiguously expressed intent of Congress.⁹¹ The court employs the traditional tools of statutory construction to determine Congress’s intent, including the statute’s legislative history and the agency’s past administrative practice.⁹² If, however, Congress has not directly addressed the precise question at issue, the court defers to the agency interpretation so long as it is based on a permissible construction of the statute.⁹³

85. See H.R. REP. NO. 93-412, at 10 (1973). “Endangered” species means “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). “Threatened” species is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

86. See *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144–45 (9th Cir. 2001) (*Defenders I*); *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553, 566 (D.Vt. 2005); *Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1167–69 (D. Or. 2005) (*Defenders III*).

87. See *infra* notes 118–121 and accompanying text.

88. 467 U.S. 837 (1984).

89. *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1144 (9th Cir. 2007); *Chevron*, 467 U.S. at 842.

90. *Chevron*, 467 U.S. at 842.

91. *Id.* at 842–43.

92. *Id.* at 843 n.9. A court may inspect legislative history and past administrative practice to determine congressional intent. See *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986).

93. *Id.* at 843.

B. By Broadening the ESA, Congress Intended to Protect Species in Any Portion of Their Range

The current ESA, the third in a series of statutes aimed at protecting endangered species, greatly expands the protection afforded to species.⁹⁴ The previous two statutes defined “endangered species” narrowly, including only those species facing total extinction.⁹⁵ Neither statute extended protection to species endangered in only a significant portion of its range.⁹⁶ The inclusion of “significant portion of its range” was thus a significant broadening of protection.⁹⁷ This broadening of protection enabled the Services to act early to save a species before it declined throughout its range. Enabling such preventative measures was one of Congress’s main concerns in enacting the 1973 Act.⁹⁸

C. Courts Have Interpreted “Significant Portion of its Range” to Mean Historical Range

Most courts have interpreted “significant portion of its range” to mean historical range. The Ninth Circuit’s opinion in *Defenders of Wildlife v. Norton*⁹⁹ (*Defenders I*) is representative. In reviewing the FWS’s decision to deny protection for the flat-tailed horned lizard, the Ninth Circuit noted that the addition of “a significant portion of its range” broadened the ESA’s protections to include species in danger of extinction “in any portion of its range.”¹⁰⁰ The court explained:

[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. Those areas need not coincide with national or state political boundaries, although they can. The Secretary necessarily has a wide degree of discretion in

94. See *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144 (9th Cir. 2001) (*Defenders I*) (citing Endangered Species Conservation Act, Pub. L. No. 91-135 §3(a), 83 Stat. 275 (Dec. 5, 1969) and Endangered Species Preservation Act, Pub. L. No. 89-669 §1(c), 80 Stat. 926 (Oct. 15, 1966)).

95. *Id.*

96. *Id.*

97. *Id.*; see also H.R. REP. NO. 93-412, at 10 (1973) (noting that protection of a species in danger of extinction “in any portion of its range” represented a “significant shift in the definition in existing law . . .”).

98. See S. REP. NO. 93-307, at 3 (1973), as reprinted in 1973 U.S.C.C.A.N. 2989, 2991.

99. 258 F.3d 1136.

100. *Id.* at 1144 (quoting H.R. REP. NO. 93-412, at 10 (1973)).

delineating ‘a significant portion of its range,’ since the term is not defined in the statute. But where . . . it is apparent that the area in which [a species] is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a ‘significant portion of its range’.¹⁰¹

The FWS contended that “significant portion of its range” meant that a “species is eligible for protection under the ESA if it ‘faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be within the foreseeable future.’”¹⁰² Addressing the FWS’s argument, the Ninth Circuit first noted that the phrase “in danger of extinction throughout . . . a significant portion of its range” was inherently ambiguous and “something of an oxymoron.”¹⁰³ The court then rejected the FWS’s interpretation because it made the threat of extinction throughout “a significant portion of its range” equivalent to the threat of extinction throughout all of its range, thereby rendering Congress’s addition of the phrase “a significant portion of its range” superfluous.¹⁰⁴

The District Court of Oregon and the District Court of Vermont approved of the Ninth Circuit’s interpretation of “significant portion of its range” in reviewing the 2003 gray wolf downlisting rule.¹⁰⁵ In 2003, the FWS published a Final Rule establishing three DPSs for the gray wolf in the coterminous United States, and downlisting the conservation status of the Eastern DPS and the Western DPS from “endangered” to “threatened.”¹⁰⁶ In defending this rule at trial, the FWS argued that “significant portion of the range” was properly defined as “that area that

101. *Id.* at 1145.

102. *Id.* at 1141.

103. *Id.*

104. *Id.* at 1141–42. The agency had not considered “extinction throughout . . . a significant portion of [the flat-tailed horned lizard’s] range” in the Notice withdrawing the listing proposal, and had only offered its interpretation of “significant portion of its range” during litigation. *Id.* at 1145–46. Therefore, the court did not treat the agency’s interpretation with any *Chevron* deference. *Id.* at 1145–46 n.11.

105. See Memorandum from David Bernhardt, Solicitor, Department of the Interior, to H. Dale Hall, Director, Fish & Wildlife Serv., at 1–2 n.2 (Mar. 16, 2007), available at <http://www.doi.gov/solicitor/M37013.pdf> (“Seven district courts have essentially adopted or followed the Ninth Circuit’s interpretation.”).

106. 2003 *Final Rule*, *supra* note 5, at 15,804 (downlisting the Eastern and Western DPS). The Eastern DPS consisted of 21 states, and the Western DPS consisted of 7 states and parts of 2 other states. *Id.* at 15,818.

is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the taxon to persist into the foreseeable future.”¹⁰⁷ The FWS determined that the areas outside of the current range of the core gray wolf populations were not significant to the species as a whole.¹⁰⁸ The agency therefore limited its analysis of the five listing factors to the current range of existing wolf populations, even though the downlisting action affected the conservation status of the gray wolf across thirty states.¹⁰⁹

The District Court of Oregon ruled that the agency’s interpretation of “significant portion of its range” was contrary to the ESA and Ninth Circuit precedent.¹¹⁰ Citing *Defenders I*, the court held that by excluding all other portions of the wolf’s historical range because a core population ensured the viability of a DPS, the agency’s interpretation rendered the phrase “significant portion of its range” superfluous.¹¹¹ The court further noted that this interpretation ran “counter to Congressional intent,” because it ignored “the statutory modification to protect species in ‘any portion of its range.’”¹¹² The court noted that *Chevron* deference, the general rule that courts defer to an agency’s reasonable interpretation of a statute,¹¹³ does not apply where the agency’s interpretation runs contrary to Congress’s intent.¹¹⁴ The court therefore held that the FWS’s interpretation of “significant portion of its range” was owed no deference because it was unreasonable.¹¹⁵

107. See *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553, 565 (D. Vt. 2005); *Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1167–69 (D. Or. 2005) (*Defenders III*). The definition was not clearly set forth in the Final Rule. *Defenders III*, 354 F. Supp. 2d at 1165. The FWS relied on a definition discussed at a separate meeting at Marymount University where the FWS discussed the meaning of the phrase “significant portion of its range” in the context of the gray wolf. *Id.* The court found that since the Final Rule discussed the wolf’s long term viability, the FWS had referred to the Marymount definition in the Final Rule. *Id.*

108. *Nat’l Wildlife*, 386 F. Supp. 2d at 565; *Defenders III*, 354 F. Supp. 2d at 1164.

109. *Nat’l Wildlife*, 386 F. Supp. 2d at 565; *Defenders III*, 354 F. Supp. 2d at 1167; see 2003 *Final Rule*, *supra* note 5, at 15,818; see also 2003 *Final Rule*, *supra* note 5, at 15,812, 15,816 (existing wolf populations ranged only through parts of Michigan, Minnesota, and Wisconsin in the Eastern DPS, and parts of Montana, Idaho, and Wyoming in the Western DPS).

110. *Defenders III*, 354 F. Supp. 2d at 1167.

111. *Id.* at 1168 (citing *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001) (*Defenders I*)).

112. *Id.*

113. See *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136 (9th Cir. 2007); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

114. *Defenders III*, 354 F. Supp. 2d at 1168.

115. *Id.* at 1168–69.

The District Court of Vermont, reviewing the same 2003 gray wolf delisting rule, came to the same conclusion as the District Court of Oregon. The court noted that the FWS's interpretation rendered all areas outside the core populations in the Western Great Lakes region insignificant, even though the agency had already acknowledged that there would be "extensive and significant gaps" in the wolf's range.¹¹⁶ The court therefore gave no deference to the FWS's interpretation because it was contrary to the plain meaning of the phrase "significant portion of its range."¹¹⁷

D. Historically, the FWS Has Listed Species Throughout Their Historical Range

The FWS has listed many species as endangered or threatened throughout their historical range, even though the species occupied only a small portion of their range at the time of listing. For example, the FWS listed the grizzly bear throughout the coterminous forty-eight states,¹¹⁸ although at the time of listing, the grizzly bear was confined to isolated regions in Montana, Idaho, and Wyoming.¹¹⁹ The American black bear was listed throughout its historical range, although by the time of listing it occupied only two core areas in Louisiana.¹²⁰ The gray wolf was also listed throughout its historical range, although it was extirpated from nearly all of its historical range in the lower forty-eight states by the time of listing.¹²¹ These listings demonstrate that the FWS once interpreted "significant portion of its range" to mean a species' historical range.

116. Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553, 566 (D. Vt. 2005) (quoting *Defenders III*, 354 F. Supp. 2d at 1166).

117. *Id.*

118. Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31,734, 31,735 (July 28, 1975) (to be codified at 50 C.F.R. pt. 17).

119. *Id.* at 31,734.

120. Threatened Status for the Louisiana Black Bear and Related Rules, 57 Fed. Reg. 588, 590 (Jan. 7, 1992) (to be codified at 50 C.F.R. pt. 17).

121. Luigi Boitani, *Wolf Conservation and Recovery, in WOLVES: BEHAVIOR, ECOLOGY, AND CONSERVATION* 317, 321 (L. David Mech & Luigi Boitani, eds., 2003) ("By 1930, the wolf had disappeared from almost all the forty-eight contiguous states . . ."); see *1978 Reclassification*, *supra* note 17.

IV. COURTS HAVE AT TIMES FOUND THE DESIGNATION OF A DPS TO BE ARBITRARY AND CAPRICIOUS

Under the Administrative Procedure Act (APA), courts may set aside agency actions that are arbitrary and capricious, or otherwise not in accordance with law.¹²² Courts have generally found DPS designations to be arbitrary and capricious when the designation reduces protections for populations already determined to warrant listing.¹²³

A. Courts Reject Agency Actions That Are Arbitrary and Capricious

The APA governs judicial review of administrative decisions under the ESA.¹²⁴ Under section 706(2) of the APA, a reviewing court may set aside agency actions, findings, and conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹²⁵ A court applying this standard presumes the agency action to be valid and affirms the action “if a reasonable basis exists for its decision.”¹²⁶ In determining whether an agency action is arbitrary and capricious, the court considers “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹²⁷

B. Where the FWS Has Appeared to Use the DPS Designation to Bypass the ESA’s Statutory Protections, Courts Have Deemed Such Action Arbitrary and Capricious

Courts have generally found DPS designations that reduce protections for populations already determined to warrant listing to be arbitrary and

122. 5 U.S.C. § 706(2)(A) (2000).

123. For example, in the 2003 gray wolf downlisting action, courts found the FWS’s designation of the gray wolf DPSs to be arbitrary and capricious because it bypassed application of the ESA in non-core population areas. *See Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005); *Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1171–72 (D. Or. 2005) (*Defenders III*); *Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Serv.*, 12 F. Supp. 2d 1121, 1133 (D. Or. 1997).

124. 5 U.S.C. § 706; *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1276 (D.N.M. 2005).

125. 5 U.S.C. § 706(2)(A).

126. *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007).

127. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

capricious.¹²⁸ Courts have viewed such designations as a tactic to bypass the ESA's protections, contrary to the general intent and purpose of the ESA.¹²⁹ Thus, where an agency has previously found that an entire species should be protected under the ESA, the agency cannot then choose to only protect smaller population segments without providing an explanation.¹³⁰ For example, the FWS had originally determined that "listing of the bull trout was warranted, although precluded, throughout the coterminous United States."¹³¹ When the FWS later decided to divide the bull trout species into five population segments and only list two of the population segments, a court found that the FWS's sudden switch was arbitrary and capricious.¹³² The court noted that the FWS provided no reasoning for why such an approach was warranted.¹³³ In so concluding, the court stated:

As [FWS]'s own population segment policy acknowledges, listing of population segments 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 [the FWS] has already determined, on the same information, warrants listing throughout a larger range.¹³⁴

Two district courts likewise viewed the 2003 designation and downlisting of the gray wolf DPSs as a tactic for removing protections in areas where the FWS had already determined protection was warranted, noting especially the continued threats to low and nonexistent populations outside of the core areas.¹³⁵ The FWS had extended the boundaries from the core population areas of the gray wolf to encompass the wolf's entire historical range, resulting in populations of dramatically

128. See *Nat'l Wildlife*, 386 F. Supp. 2d at 566; *Defenders III*, 354 F. Supp. 2d at 1171; *Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Serv.*, 12 F. Supp. 2d 1121, 1133–34 (D. Or. 1997).

129. See *Defenders III*, 354 F. Supp. 2d at 1171; *Friends*, 12 F. Supp. 2d at 1133.

130. See *Defenders III*, 354 F. Supp. 2d at 1171; *Friends*, 12 F. Supp. 2d at 1133.

131. See *Friends*, 12 F. Supp. 2d at 1133. Under the ESA, a petitioned action may be warranted but precluded "by pending proposals to determine whether any species is an endangered or a threatened species" and that "expeditious progress is being made to add qualified species" to the list of endangered and threatened species. 16 U.S.C. § 1533(b)(3)(B)(iii) (2000).

132. See *Friends*, 12 F. Supp. 2d at 1133.

133. *Id.*

134. *Id.* (citing *DPS Policy*, *supra* note 14, at 4725).

135. *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005); *Defenders III*, 354 F. Supp. 2d at 1170–71.

varying conservation status within each DPS.¹³⁶ This decreased the protection afforded to the gray wolf even though the population status of the wolf had not improved outside of the core recovery areas.¹³⁷ The courts stated that the FWS cannot designate DPSs in such a manner so as to “bypass the application of the ESA in non-core population areas.”¹³⁸ The courts thus held that this application of the DPS Policy was arbitrary and capricious.¹³⁹

In sum, courts have generally found DPS designations that reduce protections for populations already determined to warrant listing to be arbitrary and capricious. Courts view such designations as a tactic to bypass the ESA’s protections, contrary to the general intent and purpose of the ESA. The FWS’s 2003 designation and downlisting of the gray wolf DPSs removed protections in areas the FWS had already determined warranted protection, and was therefore held arbitrary and capricious.

V. THE FWS CONTINUES TO DELIST GRAY WOLVES BY DESIGNATING AND DELISTING DPSS

The FWS has recently proposed and finalized rules designating and delisting the Northern Rocky Mountain and Western Great Lakes gray wolf DPSs.¹⁴⁰ The DPS boundaries in this latest delisting effort are more narrowly drawn around existing wolf populations than the DPS boundaries in the 2003 downlisting effort.¹⁴¹ However, the FWS has continued to interpret “range” to mean the gray wolf’s current range, rather than the wolf’s historical range.¹⁴²

136. *Defenders III*, 354 F. Supp. 2d at 1171; see *Nat’l Wildlife*, 386 F. Supp. 2d at 565.

137. *Defenders III*, 354 F. Supp. 2d at 1171; see also *Nat’l Wildlife*, 386 F. Supp. 2d at 565.

138. *Nat’l Wildlife*, 386 F. Supp. 2d at 565; accord *Defenders III*, 354 F. Supp. 2d at 1172.

139. *Nat’l Wildlife*, 386 F. Supp. 2d at 566; *Defenders III*, 354 F. Supp. 2d at 1171.

140. 2007 NRM Proposed Rule, *supra* note 8, at 6106; 2007 WGL Final Rule, *supra* note 8, at 6052.

141. 2007 WGL Final Rule, *supra* note 8, at 6060–61.

142. 2007 NRM Proposed Rule, *supra* note 8, at 6115; 2007 WGL Final Rule, *supra* note 8, at 6069.

A. *The FWS Recently Published Rules Designating and Delisting Two Gray Wolf DPSs*

The FWS has continued to pursue the delisting of gray wolf DPSs. On February 8, 2007, the FWS published a Proposed Rule designating the Northern Rocky Mountain population of gray wolf as a DPS and simultaneously delisting it.¹⁴³ Likewise, the FWS also published a Final Rule designating the Western Great Lakes population of gray wolves as a DPS and simultaneously delisting it.¹⁴⁴

These most recent delisting proposals differ slightly from the delisting attempts struck down by the District Courts of Oregon and Vermont in 2005.¹⁴⁵ In its previous delisting attempts, the FWS expanded the boundaries of the DPSs to downlist large regions within which the conservation status of the wolf populations varied dramatically.¹⁴⁶ In contrast, the DPS boundaries in this latest delisting effort are more narrowly drawn around existing wolf populations, generally including only the core populations and a zone around the core populations based on known dispersal distances and wolf movement.¹⁴⁷

B. *The Rules Designating and Delisting the Two Gray Wolf DPSs Interpret "Range" to Mean the Gray Wolf's Current Range*

In its latest rules, the FWS again limited the section 4 delisting assessment to the gray wolf's current range. The FWS asserted in the Proposed Rule and the Western Great Lakes Final Rule that "[t]he word 'range' in the phrase 'significant portion of its range' refers to the range in which a species currently exists, not to the historical range of the species where it once existed."¹⁴⁸ The FWS reasoned that under the

143. 2007 NRM Proposed Rule, *supra* note 8, at 6106.

144. 2007 WGL Final Rule, *supra* note 8, at 6052.

145. See Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005); Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior, 354 F. Supp. 2d 1156, 1167–69 (D. Or. 2005) (*Defenders III*).

146. See 2003 Final Rule, *supra* note 5, at 15,862; *Defenders III*, 354 F. Supp. 2d at 1171.

147. 2007 WGL Final Rule, *supra* note 8, at 6060–61 (explaining how the Western Great Lakes DPS includes core recovered wolf populations plus a wolf movement zone around the core populations).

148. 2007 NRM Proposed Rule, *supra* note 8, at 6115; 2007 WGL Final Rule, *supra* note 8, at 6069. Although the FWS attempted to define "significant portion of its range" as a phrase in the 2003 delisting effort, the agency now separately interprets the words "range," and "significant." 2007 NRM Proposed Rule, *supra* note 8, at 6115; 2007 WGL Final Rule, *supra* note 8, at 6069.

ESA, a species is “endangered” only if it “is in danger of extinction” in the relevant portion of its range.¹⁴⁹ The FWS noted that “[t]he phrase ‘is in danger’ denotes a present-tense condition of being at risk of a future, undesired event.”¹⁵⁰ The agency thus argued that it was inconsistent with common usage to say that a species “is in danger” in an area that is currently unoccupied, such as an unoccupied historical range.¹⁵¹ The FWS also noted that section 4 of the ESA requires the FWS to consider the “present” or “threatened” (i.e., future rather than the past) “‘destruction, modification, or curtailment’ of a species’ habitat or range in determining whether a species is endangered or threatened.”¹⁵² The FWS argued therefore that “range” must mean currently occupied range, not historical range.¹⁵³

In both the Northern Rocky Mountain Proposed Rule, and the Western Great Lakes Final Rule, the FWS expressly rejected the Ninth Circuit’s conclusion that “range” in “significant portion of its range” includes the historical range of a species.¹⁵⁴ The FWS asserted that the Ninth Circuit inadvertently misquoted the statutory language, and states that the agency is to determine if a species “is in danger of extinction throughout . . . a significant portion of its range,” not whether a species is “extinct throughout . . . a significant portion of its range.”¹⁵⁵ The FWS argued that a species cannot presently be “in danger of extinction” in that portion of its range where it “was once viable” but no longer exists because in that portion of its range, the species by definition has ceased

149. *2007 NRM Proposed Rule*, *supra* note 8, at 6115; *2007 WGL Final Rule*, *supra* note 8, at 6069.

150. *2007 NRM Proposed Rule*, *supra* note 8 at 6115; *2007 WGL Final Rule*, *supra* note 8, at 6069.

151. *2007 NRM Proposed Rule*, *supra* note 8, at 6115; *2007 WGL Final Rule*, *supra* note 8, at 6069.

152. *2007 NRM Proposed Rule*, *supra* note 8, at 6115 (citing 16 U.S.C. §1533(a)(1)(A)); *2007 WGL Final Rule*, *supra* note 8, at 6069 (citing 16 U.S.C. §1533(a)(1)(A) (2000)).

153. *2007 NRM Proposed Rule*, *supra* note 8, at 6115; *2007 WGL Final Rule*, *supra* note 8, at 6069.

154. *2007 NRM Proposed Rule*, *supra* note 8, at 6115; *2007 WGL Final Rule*, *supra* note 8, at 6069.

155. *2007 NRM Proposed Rule*, *supra* note 8, at 6115; *2007 WGL Final Rule*, *supra* note 8, at 6069.

to exist.¹⁵⁶ In such situations, the species is not “in danger of extinction” because it is already extinct.¹⁵⁷

In sum, the FWS has continued to limit the section 4 delisting assessment to the current range of a species. The FWS expressly rejected the Ninth Circuit’s conclusion that “range” in “significant portion of its range” includes the historical range of a species. The FWS argued that such an interpretation is inconsistent with common usage and with the text of the statute.

VI. DELISTING A DPS WITHOUT ANALYZING THE ENTIRE LISTED SPECIES IS ARBITRARY AND CAPRICIOUS

Using DPS designations to redefine what constitutes the gray wolf’s “range” circumvents the statutory requirement that the agency comprehensively assess the species’ historical range, and is thus arbitrary and capricious under section 706 of the APA.¹⁵⁸ The FWS’s most recent interpretation of “range” is owed no *Chevron* deference because it is contrary to the expressed intent of Congress, as ascertained through the legislative history of the ESA and the agency’s historical practice.¹⁵⁹ Instead, “range” should be interpreted to mean a species’ historical range. In delisting the gray wolf, the FWS must comprehensively assess the gray wolf’s status throughout its historical geographic range in its delisting determination. Designating and delisting the gray wolf DPSs circumvents this statutory requirement and is thus arbitrary and capricious under section 706 of the APA.¹⁶⁰ The designation of the Northern Rocky Mountain and Western Great Lakes DPSs is also inconsistent with the DPS Policy.¹⁶¹ Removing protections from critical source populations without evaluating the effects on the

156. 2007 NRM Proposed Rule, *supra* note 8, at 6115; 2007 WGL Final Rule, *supra* note 8, at 6069–70.

157. 2007 NRM Proposed Rule, *supra* note 8, at 6115; 2007 WGL Final Rule, *supra* note 8, at 6069–70.

158. 16 U.S.C. § 1533(a) (2000); 16 U.S.C. § 1532(6), (20) (2000); *see Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1172 (D. Or. 2005) (*Defenders III*).

159. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986).

160. 16 U.S.C. § 1533(a); § 1532(6), (20); *see Defenders III*, 354 F. Supp. 2d at 1172.

161. *See Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (“Having chosen to promulgate the DPS Policy, the FWS must follow that policy.”).

overall species could cause setbacks to the recovery prospects of the overall species.¹⁶²

A. *The FWS's Interpretation of "Range" Is Owed No Chevron Deference*

The FWS's interpretation of "range" to mean the currently occupied range of the species is owed no *Chevron* deference because it is contrary to the expressed intent of Congress, as ascertained through the legislative history of the ESA and the agency's historical practice.¹⁶³ First, this interpretation is contrary to the legislative history of the addition of "significant portion of its range" to the ESA, as well as the ESA itself. Congress included management tools to save a species before it declined throughout its range in the 1973 Act to address the lack of such tools in the 1969 Endangered Species Conservation Act.¹⁶⁴ One such tool was the addition of "significant portion of its range" to the definition of "endangered." This addition gave the Services the flexibility to act to save a species before it declined throughout its range, and significantly broadened protections for species.¹⁶⁵ Congress also demonstrated its intent to broaden protections for species by creating the "threatened" classification and imposing the requirement that the agency rely on best available science to determine a species' status.¹⁶⁶

Congress further broadened protection for species throughout their historical range by adding "distinct population segment" to the definition of "species" in 1978.¹⁶⁷ The FWS then justified the DPS Policy on the grounds that DPS designations would "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

162. Designating and delisting DPSs from a broadly listed species may benefit recovery efforts in some respects. First, it may free up federal resources that can be redirected to those populations that are in peril. Second, delisting populations as they recover may also allow more management flexibility. See Mech, *Challenge*, *supra* note 24, at 273–74. Lastly, delaying the delisting of recovered populations may fuel existing animosity to the ESA and listing of other controversial species. See L. David Mech, *Why I Support Federal Wolf Delisting*, INT'L WOLF, Spring 2004, at 5.

163. See *Chevron*, 467 U.S. at 843 n.9; *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986).

164. S. REP. 93-307, at 3 (1973).

165. See *id.*

166. See *id.*; *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1275 (D.N.M. 2005).

167. S. REP. NO. 96-151, at 7 (1979).

needed to recover an entire species or subspecies.”¹⁶⁸ If Congress intended only to protect a species within its current range at the time of listing, there would have been little need to provide such a mechanism to enable protections for species before the species declined throughout its range.

Second, the FWS’s past administrative practice demonstrates that Congress intended “significant portion of its range” to mean a species’ historical range.¹⁶⁹ The FWS once interpreted “significant portion of its range” to mean a species’ historical range. For example, the FWS listed the grizzly bear throughout its historical range of the coterminous forty-eight states, even though the grizzly was confined to isolated regions in Montana, Idaho and Wyoming by the time of listing.¹⁷⁰ The American black bear and the gray wolf were likewise extirpated from nearly all of their historical ranges, yet both were listed throughout their historical ranges.¹⁷¹ Therefore, under the first step of *Chevron*, the FWS’s interpretation is owed no deference because it is contrary to the expressed intent of Congress.¹⁷²

However, even if “significant portion of its range” is ambiguous, the agency’s current interpretation is an impermissible construction of the ESA. First, the FWS’s current interpretation of “range” is inconsistent with the agency’s past applications of the ESA, and is thus due considerably less deference.¹⁷³ The FWS’s most recent interpretation of “range” in the phrase “significant portion of its range” to mean “current range,” would significantly narrow the scope of protection for species, by limiting protections to the species’ current range at the time of listing.

Second, the FWS’s current interpretation is inherently unreasonable because it sets the baseline range as the range at the time of listing. If, by

168. *DPS Policy*, *supra* note 14, at 4725.

169. A court may inspect legislative history and past administrative practice to determine congressional intent. *See Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986).

170. Amendment Listing the Grizzly Bear of the 48 Coterminous States as a Threatened Species, 40 Fed. Reg. 31,734 (July 28, 1975) (to be codified at 50 C.F.R. pt. 17).

171. Endangered and Threatened Wildlife and Plants; Threatened Status for the Louisiana Black Bear and Related Rules, 57 Fed. Reg. 588 (Jan. 7, 1992) (to be codified at 50 C.F.R. pt. 17); Boitani, *supra* note 121, at 321 (“By 1930, the wolf had disappeared from almost all the forty-eight contiguous states . . .”); *1978 Reclassification*, *supra* note 17.

172. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

173. *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)) (stating that an agency interpretation of a provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference).

the time of listing, a species is extirpated from almost all of its range, the agency could look only at the currently occupied range and determine the species is healthy as it is abundant in the one area in which it remained.¹⁷⁴ The FWS's interpretation also creates an incentive for those seeking to avoid ESA restrictions on their property to minimize the range of the species by killing the animals before the species is listed.¹⁷⁵

In sum, the FWS's interpretation of "range" to mean the species' current range is contrary to the expressed intent of Congress and is owed no deference. However, even if "significant portion of its range" is considered to be ambiguous, courts should not defer to the FWS's current interpretation of "range" because it is inherently unreasonable. Instead, courts should interpret "range" to mean a species' historical range, consistent with Congressional intent as expressed in the ESA's legislative history and the agency's historical practice.¹⁷⁶

B. Designation of the Gray Wolf DPSs Is Arbitrary and Capricious Because It Precludes the Statutory Mandate to Assess the Threats to the Gray Wolf Throughout its Historical Range

In delisting the gray wolf, the FWS must comprehensively assess the gray wolf's status throughout its historical geographic range in its delisting determination. The gray wolf was previously listed and protected across its historical range of the coterminous forty-eight states.¹⁷⁷ However, in its new delisting proposals, the FWS has used the DPS designations to redefine what constitutes the gray wolf's "range" and circumscribe the section 4 delisting analysis. For both of the proposed delistings, the FWS has defined the "range" of the gray wolf to be the area within the DPS boundaries where viable populations of the species *currently* exist, rather than the historical range of the species where it once existed.¹⁷⁸

174. See 2006 WGL Proposed Rule, *supra* note 15, at 15,267 (explaining that gray wolf was extirpated from nearly all of its historical range in the lower 48 states).

175. Charles Pope, *Democrats Moving to Protect Species Act*, SEATTLE POST-INTELLIGENCER, Mar. 29, 2007, at B3.

176. *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144–45 (9th Cir. 2001) (*Defenders I*).

177. See 1978 Reclassification, *supra* note 17. The range of the gray wolf was later modified to exclude the southeastern United States when wolves in that area were redesignated as red wolves. See 2003 Final Rule, *supra* note 5, at 15,804.

178. See 2007 NRM Proposed Rule, *supra* note 8, at 6115; 2007 WGL Final Rule, *supra* note 8, at 6069.

The agency thus avoids the necessity of applying the section 4 delisting factors to the gray wolf's originally listed, historical range.¹⁷⁹ An analysis of the gray wolf throughout its historic range would likely result in a decision to keep the gray wolf listed as endangered, given that the gray wolf currently occupies only a small percentage of it.¹⁸⁰ Instead, as the DPS boundaries contain little more than the current recovering populations, analysis of the section 4 delisting factors within the DPS boundaries would show that the species is not threatened or endangered.

As with the 2003 downlisting attempts, these latest delisting efforts manipulate what constitutes a significant portion of the gray wolf's range and limit application of the five listing factors to the current gray wolf range rather than the historical range.¹⁸¹ Focusing the analysis of the section 4 listing factors only within the DPS boundaries unreasonably ignores and excludes large geographical areas in which the gray wolf once existed and is still listed. Under section 706(2) of the APA, the reviewing court may set aside agency actions, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁸² Using DPS designations to redefine what constitutes "significant portion of its range" circumvents the statutory requirement that the agency comprehensively assess the species' historical range.¹⁸³ Designating DPSs in such a manner to avoid this statutory mandate is therefore arbitrary and capricious.¹⁸⁴

Requiring the FWS to examine the section 4 factors throughout the areas in which the species was once viable enables an assessment of the species' range-wide health, and prevents the use of DPSs to segment out a narrow view of the species' health. A comprehensive assessment of the

179. See *2007 NRM Proposed Rule*, *supra* note 8, at 6135 ("[W]e considered the five potential threat factors . . . throughout all or a significant portion of their range in the [Northern Rocky Mountain] DPS . . ."); see also *2007 WGL Final Rule*, *supra* note 8, at 6100 ("[W]e considered the five potential threat factors . . . in the [Western Great Lakes] DPS . . .").

180. As of 2003, conservation groups estimated that gray wolves occupied only five percent of their historic range. See Dennis Webb, *Carbondale Audience Sinks Teeth Into Wolf Issue*, GLENWOOD SPRINGS POST INDEPENDENT, Jan. 16, 2006, available at <http://www.postindependent.com/article/20060119/VALLEYNEWS/60119003&SearchID=73269882702030>.

181. *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 565 (D. Vt. 2005); *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1167 (D. Or. 2005) (*Defenders III*).

182. 5 U.S.C. § 706(2)(A) (2000).

183. 16 U.S.C. § 1533(a) (2000); 16 U.S.C. § 1532(6), (20) (2000).

184. See *Defenders III*, 354 F. Supp. 2d at 1172.

range-wide status of a species will help determine the effects of a DPS listing/delisting action on the rest of the species or remaining DPSs. An agency may only make a listing determination “after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species.”¹⁸⁵ Given the controversial nature of a few of the state gray wolf management plans, this precautionary step is especially needed.¹⁸⁶

C. Designation of DPSs for the Sole Purpose of Delisting Is Also Arbitrary and Capricious Because it Is Inconsistent with the DPS Policy

The Services’ DPS Policy¹⁸⁷ bolsters the conclusion that the DPS designations were not intended to be used for piecemeal DPS delisting. As the Services’ Joint DPS Policy notes, designation of DPSs “may allow the Services to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs that would necessitate listing a species or subspecies throughout its entire range.”¹⁸⁸ The District Court of Oregon specifically noted this, and stated that the FWS’s own DPS Policy acknowledges that listing of population segments 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 [the FWS] has already determined, on the same information, warrants listing throughout a larger range.”¹⁸⁹

The delisting of the Northern Rocky Mountain and Western Great Lakes gray wolf DPSs is thus contrary to the purpose of the DPS Policy. The DPS Policy was intended to prevent large-scale species declines.¹⁹⁰ However, gray wolves have already declined throughout their entire

185. 16 U.S.C. § 1533(b)(1)(A).

186. Hostile state attitudes towards delisting and assumption of state management duties support adopting this precautionary approach. See Jesse Alderman, *Idaho Governor Calls for Gray Wolf Kill*, ASSOCIATED PRESS., Jan. 11, 2007, available at <http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/01/11/national/a195640S26.DTL>.

187. The DPS Policy is a reasonable construction of “distinct population segment.” *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007).

188. *DPS Policy*, *supra* note 14, at 4725.

189. *Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Serv.*, 12 F. Supp. 2d 1121, 1133 (D. Or. 1997) (citing *DPS Policy*, *supra* note 14, at 4725).

190. See *DPS Policy*, *supra* note 14, at 4725.

range, and the FWS has already determined that the species warrants listing throughout its historical range in the lower forty-eight states. The designations of the Northern Rocky Mountain and Western Great Lakes DPSs are inconsistent with the DPS Policy and are therefore arbitrary and capricious.¹⁹¹

D. Public Policy Considerations Support a Comprehensive Assessment of the Overall Species

While the delisting of the most recently proposed DPSs does not affect the conservation status of other wolves outside the DPS boundary, it may adversely affect recovery prospects for the overall species. Wolves originally inhabited almost every kind of habitat in the northern hemisphere and are quite adaptable.¹⁹² Wolves are great dispersers and can move to new areas fairly easily.¹⁹³ Given these characteristics, wolves can expand their range rapidly if protected.¹⁹⁴ However, source populations of wolves are critical to the establishment of new populations and to the maintenance of populations that are heavily controlled.¹⁹⁵ These gray wolf populations also support “sink” populations that could not sustain themselves without immigration of gray wolves from elsewhere.¹⁹⁶ Removing protections from these critical source populations without evaluating the effects on the overall species could cause setbacks to the recovery prospects of the overall species.¹⁹⁷

However, to date, no range-wide recovery plan exists for the gray wolf.¹⁹⁸ Given the lack of such a plan, it is difficult to assess the potential effects that delisting the Northern Rocky Mountain and

191. See *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (“Having chosen to promulgate the DPS Policy, the FWS must follow that policy.”).

192. See L. David Mech, *Prediction Failure of a Wolf Landscape Model*, 34 WILDLIFE SOC'Y BULLETIN, 874, 875 (2006) (explaining that wolves currently exist only in wild areas because they are the only places where they can avoid human persecution).

193. See Todd Fuller, L. David Mech & Jean Fitts Cochrane, *Wolf Population Dynamics*, in WOLVES: BEHAVIOR, ECOLOGY, AND CONSERVATION 161, 163 (L. David Mech & Luigi Boitani, eds., 2003).

194. See Mech, *Challenge*, *supra* note 24, at 272.

195. See Todd Fuller, L. David Mech, & Jean Fitts Cochrane, *Wolf Population Dynamics*, in WOLVES: BEHAVIOR, ECOLOGY, AND CONSERVATION, 161, 163 (L. David Mech & Luigi Boitani, eds., 2003).

196. *Id.* at 181.

197. See *supra* note 162.

198. See *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 567 (D. Vt. 2005).

Western Great Lakes DPSs will have on the remainder of gray wolf protected areas.¹⁹⁹ Without this knowledge, it is hazardous to proceed with removing protections for these populations.²⁰⁰ A comprehensive assessment of the range-wide status of a species will help determine the effects of a DPS delisting action on the rest of the species or remaining DPSs.

VII. CONCLUSION

The FWS's designation of DPSs to delist populations of the gray wolf circumvents the statutory mandate to conduct a section 4 delisting analysis throughout the gray wolf's historical range, and is thus arbitrary and capricious. The FWS's interpretation of "range" to mean the species's current range deserves no deference as it is contrary to Congress's expressed intent. In contrast, the Ninth Circuit's interpretation of "significant portion of its range," to mean a species' historical range is supported by the ESA's legislative history and the agency's historical application.²⁰¹

The FWS must undertake a section 4 analysis of the gray wolf throughout its historical range before designating and delisting the Western Great Lakes and Northern Rocky Mountain DPSs. The recent delisting actions for the Northern Rocky Mountain and Western Great Lakes DPSs of the gray wolves fail to meet this statutory requirement. The designation and delisting of the Northern Rocky Mountain and Western Great Lakes DPSs are also inconsistent with the Services' own DPS Policy. For these reasons, the NRM Proposed Rule and WGL Final Rule are arbitrary and capricious.

199. Letter from David Parsons, The Rewilding Institute, to Edward E. Bangs, Western Gray Wolf Recovery Coordinator, U.S. Fish and Wildlife Serv. (Apr. 10, 2006), available at <http://rewilding.org/pdf/carnivoreconservation/graywolf5.pdf>.

200. Many state officials are openly hostile to the wolf. See Alderman, *supra* note 186.

201. *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001) (*Defenders I*).

