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# THE “WHOLLY SEPARATE” TRUTH: DID THE YELLOWSTONE WOLF REINTRODUCTION VIOLATE SECTION 10(J) OF THE ENDANGERED SPECIES ACT?

ELIZABETH COWAN BROWN\*

*The gray wolf has been listed as an endangered species since 1973. In 1995, the Department of the Interior and the United States Fish and Wildlife Service implemented the Northern Rocky Mountain Gray Wolf Recovery Plan (Recovery Plan), which was designed to bolster the endangered wolf population. Under the Recovery Plan, and pursuant to section 10(j) of the Endangered Species Act, Canadian gray wolves were captured and released into Yellowstone National Park and central Idaho. The Recovery Plan has since been the subject of intense litigation by ranching groups over the last several years. The major allegation of the farm bureau federations is that the Recovery Plan, as implemented, violated section 10(j), and these organizations want the reintroduced wolves removed. On January 13, 2000, the Tenth Circuit Court of Appeals delivered a major blow to the farm bureau federations involved in the litigation by holding that the Recovery Plan was conducted in full compliance with section 10(j). The court ordered that the reintroduced wolves be allowed to stay in the recovery areas. The danger, however, to this and other reintroduction programs is not over. This Comment explores the legality of the Recovery Plan, ultimately endorsing a flexible reading of section 10(j) as it applies to the Yellowstone wolves, and offering such flexibility as a means of promoting future wildlife reintroduction programs.*

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\* Managing Editor, 1999–2000, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW. This article is dedicated to Storm and Ajah, descendants of *canis lupus*. The author would like to thank her husband, James, for his unending support, understanding, and humor during the writing of this Comment.

*The first wolf [released] was an Alpha female. . . . I looked . . . into the green eyes of this magnificent creature within a spectacular landscape. I was profoundly moved by the elevating nature of America's conservation laws—laws with the power to make creation whole.*

—Bruce Babbitt, U.S. Secretary of the Interior<sup>1</sup>

## INTRODUCTION

The first documented wolf bounty was reportedly paid sometime between A.D. 46–120, when Greek officials awarded five silver drachmas to a hunter for bringing in a dead male wolf.<sup>2</sup> Years later, in France, the Statutes of Charlemagne (A.D. 742–814) recorded that “two hunters were to be employed in each French community to destroy wolves.”<sup>3</sup> During the Middle Ages, Europeans bred large wolfhounds and mastiffs for the specific purpose of killing wolves and keeping wolves away from farms.<sup>4</sup>

In North America, the Pilgrims established the first Colonial wolf bounty on November 9, 1630, in Boston, Massachusetts, only ten years after landing in the New World.<sup>5</sup> By the mid-1800s, wolves in North America had become the prime targets of the fur trade, and the object of loathing by farmers and ranchers, who feared for their families and livestock.<sup>6</sup> Between 1870 and 1877, bounty hunters employed by the United States government killed approximately 55,000 wolves each year, for a total of 385,000 wolf deaths in only seven years.<sup>7</sup> In 1907, with westward expansion in full-swing, “the United States Biological Survey declared the extermination of the wolf as the paramount objective of the government,”<sup>8</sup> and President Theodore Roosevelt labeled wolves “the beast[s] of waste and destruction.”<sup>9</sup> Thereafter, the United States government launched a full-scale cam-

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<sup>1</sup> Bruce Babbitt, *Between the Flood and the Rainbow: Our Covenant to Protect the Whole of Creation*, 2 ANIMAL L. 1, 1 (1996) (adapted from Secretary Babbitt's speech at the Consumption Population Conference in Weston, Massachusetts, on Nov. 11, 1995).

<sup>2</sup> See R.D. LAWRENCE, *TRAIL OF THE WOLF* 120 (1993).

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* at 128; Inga Haagenson Causey, *The Reintroduction of the Wolf in Yellowstone: Has the Program Fatally Wounded the Very Species it Sought to Protect?*, 11 TUL. ENVTL. L.J. 461, 462 (1998).

<sup>5</sup> See NANCY GIBSON, *WOLVES* 52 (1996).

<sup>6</sup> See LAWRENCE, *supra* note 2, at 120, 122; Causey, *supra* note 4, at 462.

<sup>7</sup> See GIBSON, *supra* note 5, at 54.

<sup>8</sup> Causey, *supra* note 4, at 462.

<sup>9</sup> Craig E. Enochs, *Gone Today, Here Tomorrow*, 4 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 91, 98 (1997).

paign aimed at the total elimination of the wolf in the United States, and it very nearly succeeded.<sup>10</sup>

In light of these historical facts, it is evident that humans have long harbored a fear and misunderstanding of the wolf, which has unfortunately been bolstered by myths, legends, and fairy tales.<sup>11</sup> Fortunately, the light of conservation shone even in the midst of the government-sponsored extirpation of the wolf, and in 1872 the Yellowstone National Park Act (1872 Act) was enacted.<sup>12</sup> In addition to creating Yellowstone Park, the 1872 Act directed the Secretary of the Interior (Secretary) to prevent the “wanton destruction of . . . game . . . within the park, and [to protect] against their capture or destruction.”<sup>13</sup> Subsequently, years of bitter debate ensued over the need for wildlife protection throughout the United States. Finally, one hundred years later, Congress affirmed the need for plant and wildlife conservation by passing the 1973 Endangered Species Act (ESA).<sup>14</sup>

The ESA was landmark legislation in the area of species conservation, but its provisions did not adequately address the inherent conflict between wildlife renewal and the human society and economy. To address this deficiency, in 1982 Congress added amendment 10(j) to the ESA, which provided for the reintroduction of “experimental populations” of an endangered species to an area.<sup>15</sup> Section 10(j) was designed to allow the Secretary to enhance the growth of endangered species’ populations by enabling a species to repopulate its former range, while giving the Secretary enough management

<sup>10</sup> See National Wildlife Federation, *Wolf Facts* (visited Jan. 26, 2000) <<http://www.nwf.org/nwf/wolves/wolffacts.html>>; Rocky Barker, *War on Wolves was Fierce, Cruel*, POST REGISTER, Jan. 15, 1995 (visited Nov. 24, 1998) <<http://www.idahonews.com/wolfw8war.htm>>. The United States government hired three hundred full-time hunters and trappers for predator control and offered bounties to wolf killers. Hunters poisoned wolves, shot them, dragged pups from dens, and even used biological warfare against them (veterinarians introduced sarcoptic mange into the wolf population to weaken and kill it). As a result, the wolf had disappeared from the Great Plains by 1926 and from Washington, Colorado, and Wyoming by 1943. Montana reported that between 1883 and 1918, approximately 80,730 wolves were killed in that state alone. See Causey, *supra* note 4, at 462; Barker, *supra*.

<sup>11</sup> See LAWRENCE, *supra* note 2, at 123. Some historians have noted that fairy tales like “Little Red Riding Hood” and “The Three Little Pigs” have contributed to the negative view humans have of wolves. See *id.*

<sup>12</sup> See Yellowstone National Park Act, ch. 24, § 1, 17 Stat. 32 (1872) (codified as amended at 16 U.S.C. § 21 (West 1992)).

<sup>13</sup> *Id.* ch. 24, § 2 (codified as amended at 16 U.S.C. § 22 (West 1992)).

<sup>14</sup> See Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973 & Supp. 1996).

<sup>15</sup> See *id.* § 1539(j)(1).

flexibility to address the problems and concerns of citizens affected by the reintroduction program.<sup>16</sup>

One such reintroduction program was preliminarily approved in 1987 for the Northern Rocky Mountain gray wolf.<sup>17</sup> When the gray wolf was listed as endangered in 1973, scientists hoped that the species would naturally repopulate the Northern Rocky Mountain region, including Yellowstone Park.<sup>18</sup> However, according to government research, the gray wolf failed to repopulate its range naturally as expected.<sup>19</sup>

To bolster recovery, the United States Fish and Wildlife Service (FWS) proposed a plan which recommended introduction of an experimental population of gray wolves into Yellowstone Park and central Idaho pursuant to ESA section 10(j).<sup>20</sup> After much debate, the Recovery Plan was formally approved and signed by the Secretary on June 15, 1994.<sup>21</sup>

When, at long last, Interior Secretary Bruce Babbitt released the first reintroduced gray wolf back into Yellowstone Park in January 1995, he had the honor of carrying out a conservation plan more than one hundred years in the making.<sup>22</sup> Despite the Secretary's pride in the program, however, the gray wolf reintroduction is the subject of intense controversy, with complaints coming from both ranchers and environmental groups.<sup>23</sup> It is also the target of litigation aimed at stopping gray wolf reintroduction altogether.<sup>24</sup>

<sup>16</sup> See Wildlife and Fisheries, 50 C.F.R. § 17.84(i) (1994).

<sup>17</sup> See National Wildlife Federation, *Historical Timeline of Wolf Reintroduction* (visited Feb. 27, 1999) <<http://www.nwf.org/wolves/timeline.html>> [hereinafter *Historical Timeline of Wolf Reintroduction*].

<sup>18</sup> See THOMAS McNAMEE, *THE RETURN OF THE WOLF TO YELLOWSTONE* 33 (1997).

<sup>19</sup> See Robert C. Moore, *The Pack is Back: The Political, Social, and Ecological Effects of the Reintroduction of the Gray Wolf to Yellowstone National Park and Central Idaho*, 12 T.M. COOLEY L. REV. 647, 652-53 (1995).

<sup>20</sup> See Kevin J. Madonna, *The Wolf in North America: Defining International Ecosystems vs. Defining International Boundaries*, 10 J. LAND USE & ENVTL. L. 305, 312 (1995); *Historical Timeline of Wolf Reintroduction*, *supra* note 17.

<sup>21</sup> See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1229 (10th Cir. 2000); Madonna, *supra* note 20, at 313.

<sup>22</sup> See *Yellowstone Park Act*, ch. 24, § 2, 17 Stat. 33 (1872) (codified as amended at 16 U.S.C. §§ 21 & 22 (West 1992)).

<sup>23</sup> See *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1229-30.

<sup>24</sup> See generally *id.*; see also *United States v. McKittrick*, 142 F.3d 1170, 1173 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999) (criminal case in which defendant challenged the validity of the wolf reintroduction program after being charged with illegally killing and transporting a protected wolf).

This Comment focuses on the reintroduction of the gray wolf into Yellowstone Park and central Idaho by examining the current litigation surrounding section 10(j) of the ESA. Section I offers an introduction to the wolves themselves by describing a typical wolf pack, ultimately pointing out a pack's similarity to human society. Section II traces the ESA from its inception, and includes a description of the mechanics of section 10(j). Section III provides a brief summary of the Northern Rocky Mountain Recovery Plan, ending with the release of Canadian wolves into the recovery areas. Section IV outlines the two lawsuits which have interpreted the legality of the gray wolf reintroduction program, and, essentially, reintroduction in general.

Section V analyzes the legal arguments surrounding reintroduction and concludes that the Ninth and Tenth Circuits correctly interpreted ESA section 10(j), holding in *United States v. McKittrick* and *Wyoming Farm Bureau Federation v. Babbitt* that the Recovery Plan did not violate the ESA. Section V goes on to argue that, since the primary purpose of section 10(j) is to promote flexibility for reintroduced populations, the Yellowstone reintroduction program, and others like it, should be left to the management of the Secretary, as Congress intended. Finally, Section VI offers several alternatives to end the litigation targeted at wolf reintroduction in Yellowstone Park and elsewhere.

## I. WOLF SOCIETY

In order to appreciate why the Yellowstone wolves are worth saving, it is helpful here to understand what wolves are, how they interact with each other, and the unique contributions they make to both animal and human societies.

A typical wolf pack consists of a breeding pair, commonly known as the alpha male and alpha female, as well as their offspring and various other relatives.<sup>25</sup> There is a strict hierarchy in wolf packs, beginning with the alpha pair and descending through the middle ranks (both male and female) to the lowest ranked wolf, the omega.<sup>26</sup>

Comparing this hierarchical arrangement with human families, a leading wildlife expert noted that, "[l]ike humans, wolves evolved as

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<sup>25</sup> See JIM DUTCHER & RICHARD BALLANTINE, *THE SAWTOOTH WOLVES* 48 (1996); LAWRENCE, *supra* note 2, at 45. The other relatives often include the siblings of the alpha pair. Occasionally, a pack will accept distantly related wolves from neighboring packs. See LAWRENCE, *supra* note 2, at 45.

<sup>26</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 48-49.

cooperative family groups. Members of any healthy family develop specific roles so that the entire family functions more efficiently.<sup>27</sup> Accordingly, every wolf, no matter what rank, plays a vital role in fulfilling the pack's central goal—the survival of the pack.<sup>28</sup>

The alpha male is the undisputed leader of the pack, and achieves the top position either by fighting for it when the original alpha male dies or “retires,”<sup>29</sup> or by founding his own pack.<sup>30</sup> The alpha male dominates the beta male (second-ranked), who in turn dominates the third-ranked male, and so on.<sup>31</sup> The male and female lines of dominance are separate, but are structured similarly.<sup>32</sup> Accordingly, the alpha female achieves her position in the pack in much the same way as the alpha male achieves his.<sup>33</sup>

Like the parents in a human family, the alpha pair are the decision-makers, and control the hierarchical structure of the pack.<sup>34</sup> An important job of the alpha pair is to control food distribution, and they typically eat first and then direct the order in which the rest of the pack is permitted to eat.<sup>35</sup> Additionally, the alphas are the first to deal with any outside threats to the pack.<sup>36</sup> The alpha male and alpha female also control reproduction, and are generally the only wolves in the pack allowed to mate.<sup>37</sup>

The necessary qualities of an alpha pair include confidence, benevolence, and attention to discipline.<sup>38</sup> It is important that the alpha female be as strong in these traits as the alpha male because alpha

<sup>27</sup> *Id.* at 46.

<sup>28</sup> *See id.* at 49.

<sup>29</sup> *See id.* An aging alpha male may be unable to hold his position against a strong, young beta male, and may be deposed to a lower position within the pack. This is not a source of humiliation, but instead simply a changing of roles as a wolf ages. *See id.*; LAWRENCE, *supra* note 2, at 45.

<sup>30</sup> *See* DUTCHER & BALLANTINE, *supra* note 25, at 49.

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at 48–49.

<sup>33</sup> *See id.* at 49.

<sup>34</sup> *See id.* at 50.

<sup>35</sup> *See* DUTCHER & BALLANTINE, *supra* note 25, at 49. This is one area where wolf behavior differs from that of humans. The alpha pair eat first because they are, by definition, the strongest, healthiest wolves in the pack, and their survival is vital to the continuation of the pack. *See id.*

<sup>36</sup> *See id.* at 50.

<sup>37</sup> *See id.* at 49. Such exclusive breeding is maintained to preserve the size and integrity of the pack. In addition, natural selection dictates that only the strongest members of the pack be permitted to reproduce. On rare occasions, the beta female may be permitted to reproduce. *See id.* at 112.

<sup>38</sup> *See id.* at 49.

females have been known to lead packs, and the alpha pair commonly share and interchange roles.<sup>39</sup> The alpha pair share a special bond, which in turn cements the enormously powerful bond shared by the entire wolf pack.<sup>40</sup>

The beta pair—the second-highest ranked pair—and the mid-level wolves adopt various and changing roles within the pack.<sup>41</sup> They may take on the role of peacemaker, care for new pups, protect subordinate members from excessive displays of dominance, or choose to be the dominator.<sup>42</sup> Roles are often reversed among the mid-level members, especially as juveniles grow into adults and begin to challenge the chain of dominance.<sup>43</sup>

At the bottom of the pack hierarchy is the omega wolf.<sup>44</sup> The omega, who can be either male or female, is “chosen” by the other members of the pack.<sup>45</sup> The omega is subordinate to every other wolf in the pack, and must act accordingly.<sup>46</sup> When approached by a superior wolf, the omega usually whines deprecatingly, tucks its tail and head, and rolls onto its back in a show of submissiveness.<sup>47</sup> Many times, the omega is the brunt of dominance displays by mid-level pack members, and is often temporarily ostracized by the rest of the pack.<sup>48</sup>

The life of the omega may seem harsh, but an omega wolf is vital to pack survival.<sup>49</sup> Omegas grow very resourceful because of the hardships they endure.<sup>50</sup> They often use this resourcefulness to invent games and play, which help diffuse tension or fighting between the more superior members of the pack.<sup>51</sup> Thus, pack harmony is restored. Omegas can also play an important role in nurturing the pups.<sup>52</sup> They play with the pups, which promotes pack unity and teaches the pups how to establish their own chain of dominance.<sup>53</sup>

<sup>39</sup> See *id.*

<sup>40</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 49; GIBSON, *supra* note 5, at 10.

<sup>41</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 49, 59, 62.

<sup>42</sup> See *id.* at 59, 62.

<sup>43</sup> See *id.* at 49, 62.

<sup>44</sup> See *id.* at 49, 55.

<sup>45</sup> See *id.* at 55.

<sup>46</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 49. This is with the exception of the pups. Pups are subordinate to every other member of the pack, including juveniles, but are neither above nor below the omega. See *id.*

<sup>47</sup> See *id.* at 55, 144–45.

<sup>48</sup> See *id.* at 55.

<sup>49</sup> See *id.* at 49, 55.

<sup>50</sup> See *id.* at 55.

<sup>51</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 55.

<sup>52</sup> See *id.* at 36.

<sup>53</sup> See *id.*; LAWRENCE, *supra* note 2, at 45.



Wolf experts have stated that, “[a] wolf pack is an extended, closely-knit family unit bound by intense care-giving between its members.”<sup>54</sup> Wolves take the survival of the pack very seriously, and since “the future of the pack is in the young, . . . a wolf birth is an event.”<sup>55</sup> Historians and anthropologists have noted the similarity of pack structure to that of human society, which is likewise centered around the family unit and is also concerned primarily with survival and nurturing the young.<sup>56</sup> In fact, it is believed that early humans may have learned to live in family groups after observing the “efficient, cooperative, and highly social behavior of the wild dogs.”<sup>57</sup> Like humans, wolves play together, discipline their young, show affection for each other, and mourn their dead.<sup>58</sup> As an intelligent species, wolves have language, in the form of howls, growls, and body posture.<sup>59</sup> Like humans, wolves live together, work (hunt) together, and try to survive.

Wolf packs usually live within a specific territory, which can range from fifty to more than one thousand square miles, “depending on how much prey is available and seasonable prey movements.”<sup>60</sup> Wolves are nomadic by nature and travel over large areas seeking out vulnerable prey.<sup>61</sup> To that end, a pack may travel as far as thirty miles in one day.<sup>62</sup>

As a part of nature, wolves contribute to a balanced world ecology by fulfilling their role at the top of the food chain.<sup>63</sup> During the gray wolf’s decades-long absence from Yellowstone Park, the elk population exploded, and since most of the Yellowstone elk never leave the national park, they are not hunted.<sup>64</sup> While this may seem like a good thing for the elk, the overabundance of elk actually resulted in less food being available throughout the year, and many elk unnecessarily

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<sup>54</sup> DUTCHER & BALLANTINE, *supra* note 25, at 26.

<sup>55</sup> *Id.*

<sup>56</sup> See LAWRENCE, *supra* note 2, at 42.

<sup>57</sup> *Id.*

<sup>58</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 32, 90–91, 113.

<sup>59</sup> See *id.* at 145, 147; GIBSON, *supra* note 5, at 15; LAWRENCE, *supra* note 2, at 46.

<sup>60</sup> United States Fish & Wildlife Service, *Gray Wolf* (*canis lupus*) (visited Mar. 2, 1999) <<http://www.fws.gov/r9extaff/biologues/bio-gwol.htm>> [hereinafter *Gray Wolf*].

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See MCNAMEE, *supra* note 18, at 107. In addition, many other animals, including ravens, foxes, wolverines, and even bears survive off the remains of wolf kills. See *Gray Wolf*, *supra* note 60.

<sup>64</sup> See *id.*

starved to death.<sup>65</sup> There were too many elk in Yellowstone, and the effect on the vegetation of the park was devastating.<sup>66</sup> The once jungle-thick aspen groves in Yellowstone had been suppressed over the years by the vast number of elk, and many of the aspens left were old, weak, and losing their limbs.<sup>67</sup> One great hope for wolf reintroduction is that the wolves will help even out the number of elk in Yellowstone, thereby returning the park's ecology to its natural balance.<sup>68</sup>

## II. THE STATUTE

### A. *The Endangered Species Act of 1973*

The ESA was designed to protect both endangered and threatened species.<sup>69</sup> An endangered species is one "in danger of extinction throughout all or a significant portion of its range."<sup>70</sup> A threatened species, on the other hand, is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."<sup>71</sup>

The ESA was enacted in 1973 for the purpose of providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."<sup>72</sup> To accomplish this, the ESA declares that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act]."<sup>73</sup> This affirmative duty includes a mandate that the Secretary of the Interior promulgate a recovery plan for the conservation and survival of listed species.<sup>74</sup> In addition, the ESA charges FWS with the duty of conserving both endangered and threatened species.<sup>75</sup> In short, the ESA requires the Secretary and FWS to use all methods and procedures necessary to bring any en-

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<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See McNAMEE, *supra* note 18, at 107.

<sup>69</sup> See Endangered Species Act, 16 U.S.C. § 1531(c) (1973 & Supp. 1996).

<sup>70</sup> *Id.* § 1532(6).

<sup>71</sup> *Id.* § 1532(20).

<sup>72</sup> *Id.* § 1531(b).

<sup>73</sup> *Id.* § 1531(c)(1).

<sup>74</sup> See 16 U.S.C. § 1531(b).

<sup>75</sup> See *id.* § 1531(c)(1).

dangered or threatened species back to a position where protection is no longer necessary.<sup>76</sup>

### B. Section 10(j)

One such method for restoring an endangered species was defined when the ESA was amended in 1982 to include section 10(j).<sup>77</sup> This section authorizes the Secretary to relocate and “release . . . an endangered species or a threatened species outside the current range of such species if . . . such release will further the conservation of such species.”<sup>78</sup> Any species released pursuant to section 10(j) is classified as an “experimental population,” and must exist “wholly separate geographically from nonexperimental populations of the same species.”<sup>79</sup> Nonexperimental populations are simply those that occur naturally in a given area and that already enjoy endangered or threatened protections.<sup>80</sup> The experimental designation applies to the released species as well as to any “offspring arising *solely* therefrom.”<sup>81</sup> Accordingly, if a wolf with an experimental designation were to mate with a naturally occurring endangered wolf, the resulting offspring would automatically be classified as naturally occurring, and would thus receive full endangered protection.<sup>82</sup>

For purposes of protection, all experimental populations are preliminarily listed as threatened species, and are initially entitled to the same ESA protections that a nonexperimental threatened species receives.<sup>83</sup> However, ESA section 10(j) gives the Secretary the flexibility to adopt special rules and regulations by which to govern each experimental population.<sup>84</sup> These special rules are tailored to fit that specific species’ recovery program, and take priority over the “threatened” classification mentioned above.<sup>85</sup> The special rules list the applicable prohibitions and exceptions for that particular population, giving the Secretary the flexibility to regulate the reintroduced spe-

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<sup>76</sup> See *id.* § 1531(c).

<sup>77</sup> See *id.* § 1539(j).

<sup>78</sup> *Id.* § 1539(j) (2) (A).

<sup>79</sup> 16 U.S.C. § 1539(j) (1); see also Wildlife and Fisheries, 50 C.F.R. § 17.80(a) (1994).

<sup>80</sup> See 16 U.S.C. § 1539(j) (1).

<sup>81</sup> *Id.* (emphasis added).

<sup>82</sup> See *id.*

<sup>83</sup> See 50 C.F.R. § 17.82.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

cies more closely than if it simply received blanket "threatened" protections.<sup>86</sup>

According to section 10(j), prior to the reintroduction of any experimental population, the Secretary must also designate such population as either "essential" or "nonessential."<sup>87</sup> This is quite different from classifying a species as experimental or nonexperimental. The experimental/nonexperimental designation indicates how closely the Secretary is permitted to monitor the species.<sup>88</sup> In contrast, the essential/nonessential classification seems to indicate what type of protection the species is entitled to with regard to the general public.<sup>89</sup>

An essential experimental population is one "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild."<sup>90</sup> Any experimental population that does not fit this definition is classified as nonessential.<sup>91</sup> The basic difference between the two is that "essential" populations always receive the same protections as a threatened species, and "nonessential" populations only have such protection within the National Wildlife Refuge System or the National Park System.<sup>92</sup> Outside the borders of these areas, nonessential populations are treated as a species proposed to be listed as threatened and are protected only according to the special rules established for them by the Secretary.<sup>93</sup>

While the above definitions may seem complicated and technical, section 10(j) was actually enacted by Congress in order to simplify the Secretary's management of reintroduced experimental populations.<sup>94</sup> Because there are fewer regulatory restrictions for experimental populations than for naturally occurring endangered species, the Secretary has the flexibility to establish special rules for each population

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<sup>86</sup> See *id.*

<sup>87</sup> See 16 U.S.C. § 1539(j) (2) (B).

<sup>88</sup> Note that, by definition, all reintroduced species are experimental. See *id.* § 1539(j) (1). Any nonexperimental population is already protected by the ESA, and even the Secretary has very limited control over it. See *id.*; see also 50 C.F.R. § 17.80(a).

<sup>89</sup> See 16 U.S.C. § 1539(j).

<sup>90</sup> 50 C.F.R. § 17.80(b).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* § 17.83.

<sup>93</sup> See *id.*

<sup>94</sup> See *Unites States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999); *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000). See also H.R. REP. NO. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.

and to monitor the progress of reintroduced populations closely.<sup>95</sup> The Secretary even has the power to remove such a population, or individual members of it, if significant problems with reintroduction occur.<sup>96</sup>

### III. THE GRAY WOLF RECOVERY PLAN

As discussed in the Introduction, the gray wolf was virtually eliminated from the western portion of the United States by the early 1900s.<sup>97</sup> Due to the efforts of hunters and trappers, the gray wolf disappeared from the Great Plains and Yellowstone Park by 1926.<sup>98</sup>

The natural range of the gray wolf originally stretched from northern Canada and Alaska to the mountains of Mexico, and encompassed virtually the entire continental United States.<sup>99</sup> By the time the ESA was enacted in 1973, however, gray wolves had been eradicated from Mexico and most of the United States, and existed only in Canada, Alaska, and small areas of Minnesota and Montana.<sup>100</sup> Between 1940 and 1986, no wolf reproduction was detected in the Rocky Mountain states.<sup>101</sup>

Accordingly, pursuant to the ESA, the Secretary listed the gray wolf subspecies Northern Rocky Mountain Wolf (*canis lupus irremotus*) as an endangered species in 1973.<sup>102</sup> In 1978, the Secretary expanded this to include the entire species, and *canis lupus* was listed as endan-

<sup>95</sup> See *McKittick*, 142 F.3d at 1174; *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1232-33. See also H.R. REP. NO. 97-567, at 33.

<sup>96</sup> See 50 C.F.R. § 17.84(i).

<sup>97</sup> See *Barker*, *supra* note 10.

<sup>98</sup> See *GIBSON*, *supra* note 5, at 56.

<sup>99</sup> See *id.* at 68; *LAWRENCE*, *supra* note 2, at 146. The Southeastern United States was inhabited primarily by the red wolf, a different species than the gray wolf. The red wolf formerly occupied a vast range, stretching from Florida to Pennsylvania and from central Texas and Oklahoma to the Eastern seaboard. Due to the massive wolf killings of the nineteenth and early twentieth centuries, the red wolf is now endangered and occupies only a tiny area on North Carolina's Atlantic coast. See *LAWRENCE*, *supra* note 2, at 149 (illustration).

<sup>100</sup> See *GIBSON*, *supra* note 5, at 68.

<sup>101</sup> See *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1353 (D. Wyo. 1997), *rev'd*, 199 F.3d 1224 (10th Cir. 2000). In 1986, however, a wolf den was discovered in Glacier National Park in Montana, which has since grown to about seventy wolves. It should be noted that FWS did acknowledge to the district court in *Wyoming Farm Bureau Federation v. Babbitt* that as the number of naturally occurring wolves in Montana increases, these wolves will naturally recolonize areas of Idaho and Yellowstone Park. See *id.*

<sup>102</sup> See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1228 (10th Cir. 2000); *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).

gered in the lower forty-eight states, except in Minnesota where it was listed as a threatened species.<sup>103</sup>

In accordance with section 1533(f) of the ESA, the Department of the Interior (via FWS) appointed a wolf recovery team in 1974, which consisted of individuals from federal and state agencies, conservation groups, and livestock organizations.<sup>104</sup> The job of this team was to develop a recovery plan for the gray wolf.<sup>105</sup> The recovery team conducted extensive surveys in Montana, Idaho, and Yellowstone Park, searching for existing wolf populations and appropriate recovery areas.<sup>106</sup> Due to the team's efforts, Montana wolf sightings increased from ten in 1970 to 265 in 1990, and at least four wolf dens were documented in Montana in 1990.<sup>107</sup>

The Recovery Plan was completed in 1980 and was intended to help coordinate efforts towards the recovery of at least two viable gray wolf populations in the lower forty-eight states.<sup>108</sup> When the Recovery Plan was revised in 1987 (1987 Plan), it concluded that a population of approximately 300 wolves was required for the species to recover in areas of the western United States from which it had been eliminated.<sup>109</sup> The 1987 Plan recommended that the reintroduced population "consist of at least ten breeding pairs for three consecutive years" in each of three recovery areas (northwestern Montana, central Idaho, and Yellowstone Park).<sup>110</sup> While natural recovery was recommended in most of Idaho and Montana, the 1987 plan endorsed the establishment of a nonessential experimental population in Yellowstone Park.<sup>111</sup> The idea was to reintroduce between 90 and 150 wolves into Yellowstone Park and central Idaho between 1994 and 1999, re-

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<sup>103</sup> See 43 Fed. Reg. at 9610, 9612; see also *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1228.

<sup>104</sup> See Endangered Species Act, 16 U.S.C. § 1533(f) (1973 & Supp. 1996); *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1353. Section 1533(f)(1) imposes on the Secretary an affirmative duty to "develop and implement plans . . . for the conservation and survival of endangered species and threatened species." 16 U.S.C. § 1533(f)(1).

<sup>105</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1353.

<sup>106</sup> See Moore, *supra* note 19, at 652-53; Timothy B. Strauch, *Holding the Wolf by the Ears: The Conservation of the Northern Rocky Mountain Wolf in Yellowstone National Park*, 27 LAND & WATER L. REV. 41, 45 (1992).

<sup>107</sup> See Strauch, *supra* note 106, at 45.

<sup>108</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1353-54.

<sup>109</sup> See *id.* at 1354.

<sup>110</sup> *Id.*

<sup>111</sup> See *id.*

sulting in the recovery of at least ten breeding pairs of wolves for three successive years by 2002.<sup>112</sup>

The National Environmental Policy Act (NEPA) requires all federal agencies proposing to undertake major actions that might significantly affect the human environment to prepare and circulate Environmental Impact Statements (EISs).<sup>113</sup> An EIS is supposed to produce a “publicly reviewable physical document reflecting the required internal project analysis.”<sup>114</sup> Such public disclosure is designed to force federal agencies to consider the potential consequences of a project before acting, and also to give the public a chance to review the project proposal and to voice concerns.<sup>115</sup>

In 1992, in accordance with NEPA requirements, FWS began preparation of an EIS, which proceeded through the three stages of: (1) scoping (to identify issues and alternatives); (2) the draft EIS; and (3) the final EIS (FEIS).<sup>116</sup> At roughly the same time, the National Park Service published a report entitled *Wolves for Yellowstone?*, a two-volume, “massive compilation of scientific studies, computer modeling, and social and economic analyses, embodying virtually everything known about wolf biology.”<sup>117</sup> The report was intended to provide the government and the public with as much information about the repercussions of wolf reintroduction as possible.<sup>118</sup> It was also an attempt “to forecast how the return of the wolf was likely to affect both human concerns and natural processes in the Greater Yellowstone Ecosystem.”<sup>119</sup> In addressing the concerns of ranchers, who were the primary adversaries of wolf reintroduction, *Wolves for Yellowstone?* concluded that the wolf recovery program would have only mild effects on both hunting and ranching in the recovery areas.<sup>120</sup>

Armed with the information contained in *Wolves for Yellowstone?*, FWS began the EIS process with an extensive series of “scoping ses-

<sup>112</sup> See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1228 (10th Cir. 2000); Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60254–60255, 60266, 60269 (Nov. 22, 1994).

<sup>113</sup> See National Environmental Policy Act, 42 U.S.C. §§ 4321–4370(e) (1970); PLATER, ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 612–13 (1998).

<sup>114</sup> PLATER, ET AL., *supra* note 113, at 612.

<sup>115</sup> See *id.*

<sup>116</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1354.

<sup>117</sup> McNAMEE, *supra* note 18, at 36.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.*

<sup>120</sup> See *id.* at 37.

sions” in the spring of 1992.<sup>121</sup> These scoping sessions consisted of more than 130 public hearings nationwide, and were originally intended to be easygoing, informal meetings where individuals and groups could voice their concerns about wolf recovery.<sup>122</sup> However, because the issue had sparked such an intense debate among ranchers, environmental groups, and conservationists, the hearings received an astounding amount of public response.<sup>123</sup> Farm bureau federations and ranchers showed up at hearings with placards that read, “WYOMING IS NOT A ZOO” and “WOLVES DON’T PAY TAXES.”<sup>124</sup> Pro-wolf forces responded in kind, bringing signs that read, “BRING BACK THE WOLF,” and “ANSWER THE CALL OF THE WILD.”<sup>125</sup> Each side brought their own speakers, singers, and witnesses, with many impassioned speeches given and lively demonstrations conducted.<sup>126</sup> These hearings have been called “the most extensive public process ever conducted concerning a natural resource.”<sup>127</sup> Including the input received from the hearings, FWS received more than 170,000 comments from the public, both written and spoken.<sup>128</sup> Nearly seventy percent of those who commented favored the return of the wolves to Yellowstone Park and Idaho.<sup>129</sup>

Following these scoping sessions, the draft EIS was assembled by the recovery team, FWS, and the Department of the Interior.<sup>130</sup> It was a massive document, weighing in at over three pounds and encompassing everything from a history of wolf extirpation to projected impacts on local economies, hunting, and tourism.<sup>131</sup> Since, according to NEPA, the draft EIS was subject to public review, more hearings were held, and again, the feedback was overwhelmingly in favor of returning the wolves to Yellowstone.<sup>132</sup>

After considering the oral and written commentary on the draft EIS, FWS released the FEIS in July 1994, which set out five alternatives for a wolf recovery program: (1) reintroduction of experimental

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<sup>121</sup> See *id.* at 38.

<sup>122</sup> See GIBSON, *supra* note 5, at 61; McNAMEE, *supra* note 18, at 38.

<sup>123</sup> See GIBSON, *supra* note 5, at 61.

<sup>124</sup> McNAMEE, *supra* note 18, at 41.

<sup>125</sup> *Id.*

<sup>126</sup> See *id.* at 39.

<sup>127</sup> GIBSON, *supra* note 5, at 61.

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*; McNAMEE, *supra* note 18, at 45.

<sup>130</sup> See McNAMEE, *supra* note 18, at 40.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 40–43.



populations; (2) natural recovery (no action); (3) no wolf (change laws to prevent wolf recovery); (4) wolf management committee (establish legislation allowing states to implement wolf recovery and management without federal intervention); and (5) reintroduction of nonexperimental wolves (reintroduced wolves would have full ESA protection).<sup>133</sup> FWS favored the first option, and proposed to establish two nonessential experimental population areas (in central Idaho and Yellowstone) under ESA section 10(j).<sup>134</sup> As described previously, this meant that the wolves would (1) be technically listed as threatened; (2) receive full ESA protections within the boundaries of Yellowstone National Park; (3) receive their own special regulations for management purposes; and (4) be subject to flexible management by the Secretary.<sup>135</sup>

In accordance with section 10(j), FWS adopted a set of special management rules for the wolf recovery program, which were partly designed to address the concerns of livestock ranchers.<sup>136</sup> The final rules were published on November 22, 1994, and provided that increased management flexibility would be allowed so that private citizens could harass or even kill wolves caught in the act of killing livestock on private property.<sup>137</sup>

On June 15, 1994, Interior Secretary Bruce Babbitt signed a Record of Decision essentially approving the FEIS and adopting FWS's Recovery Plan.<sup>138</sup> The farm bureau federations attempted at the last minute to stop reintroduction by requesting a preliminary injunction from the Wyoming district court, but their motion was denied on January 3, 1995.<sup>139</sup> On January 12, 1995, the Recovery Plan commenced and the first reintroduced gray wolf, an alpha female, was

<sup>133</sup> See *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1354 & n.6 (D. Wyo. 1997), *rev'd*, 199 F.3d 1224 (Jan. 13, 2000).

<sup>134</sup> See Endangered Species Act, 16 U.S.C. § 1539(j) (1973 & Supp. 1996); *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1228-29 (10th Cir. 2000).

<sup>135</sup> See *Wildlife and Fisheries*, 50 C.F.R. § 17.80 (1994).

<sup>136</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1354.

<sup>137</sup> See *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1229; 50 C.F.R. § 17.84(i). In accordance with NEPA, FWS conducted rule-making hearings prior to adopting the final rules at which the public, including the farm bureaus and ranchers, were welcome to comment. See McNAMEE, *supra* note 18, at 47. As it turned out, unlike the early hearings, very few people showed up at any of the final rule-making hearings, and even fewer made comments expressing any concern with the final wolf reintroduction rules. See *id.*

<sup>138</sup> See *Wyoming Farm Bureau Fed'n.*, 199 F.3d at 1229. Secretary Babbitt is an ardent supporter of the gray wolf reintroduction program and was given the honor of releasing the first reintroduced wolf into Yellowstone National Park. See Babbitt, *supra* note 1, at 1.

<sup>139</sup> See McNAMEE, *supra* note 18, at 55.

released into Yellowstone Park.<sup>140</sup> The first lawsuit was filed by the Wyoming Farm Bureau Federation shortly thereafter.<sup>141</sup>

#### IV. THE CASES

##### A. *The District of Wyoming*

Given the controversy surrounding wolf reintroduction, a lawsuit was inevitable. The now famous case of *Wyoming Farm Bureau Federation v. Babbitt* was actually the result of three independent lawsuits that were joined by Judge Downes of the Wyoming district court, presumably due to the similarity of the subject matter.<sup>142</sup>

The plaintiffs alleged, among other things, that FWS violated section 10(j) of the ESA when it implemented the Recovery Plan.<sup>143</sup> Judge Downes reluctantly agreed and on December 12, 1997, he set aside the Recovery Plan, ordering that all non-native wolves and their offspring be removed from the Yellowstone Park and central Idaho experimental population areas.<sup>144</sup> The judge's order was stayed pending the defendants' appeal to the Tenth Circuit.<sup>145</sup>

The litigation involved several groups of plaintiffs. The first group of plaintiffs included the Wyoming, Montana, and Idaho Farm Bureau Federations.<sup>146</sup> These organizations represented the "educational, economic, and social interests of 48,000 members, with each Bureau having members who reside, farm, and/or ranch within the Yellowstone and central Idaho experimental population areas."<sup>147</sup> These organizations stated that by challenging wolf reintroduction, they were protecting the rights of their members to use the experi-

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<sup>140</sup> See *Babbitt*, *supra* note 1, at 1. The wolves were actually captured a few days before release. In a true last-ditch effort, the Mountain States Legal Foundation appealed to the Tenth Circuit in Denver, seeking an emergency stay. The Tenth Circuit stayed release of the wolves, who by that time had already arrived at Yellowstone, for forty-eight hours while the court considered the matter. The wolves were forced to remain caged in their small traveling pens for nearly thirty-eight hours, without any real access to food or water. The Tenth Circuit finally lifted the stay and the wolves were released. See McNAMEE, *supra* note 18, at 65-67, 84, 86-87.

<sup>141</sup> See generally *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1354.

<sup>142</sup> See McNAMEE, *supra* note 18, at 217.

<sup>143</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1370.

<sup>144</sup> See *id.* at 1376.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.* at 1355.

<sup>147</sup> *Id.* (citing Farm Bureaus' First Amended and Supplemental Complaint ¶¶ 4-6).

mental population lands to “graze livestock, hunt, fish, and for recreation and aesthetic activities.”<sup>148</sup>

The second set of plaintiffs was comprised of James R. and Cat D. Urbigkits, residents of Pinedale, Wyoming.<sup>149</sup> The Urbigkits were amateur researchers, who apparently had been searching for, studying, and reporting on naturally occurring wolves in the Yellowstone and Wyoming areas since 1988.<sup>150</sup> The Urbigkits believed the reintroduced “Canadian” wolves were a distinct subspecies (*canis lupus occidentalis*) from the naturally occurring wolves (*canis lupus irremotus*).<sup>151</sup> Accordingly, the Urbigkits alleged that the release of “Canadian” wolves halted their recreational activities, in the form of their study of “native” wolves.<sup>152</sup>

Finally, and most surprisingly to pro-wolf forces, the plaintiffs included various environmental groups (including the National Audubon Society, Predator Project, Sinapu, and Gray Wolf Committee).<sup>153</sup> These organizations were primarily concerned with protecting the endangered status of naturally occurring gray wolves.<sup>154</sup> They were concerned that naturally occurring wolves which wandered into the recovery areas would essentially lose their “endangered” designation and would mistakenly be treated as part of the experimental population.<sup>155</sup>

In the resulting joined lawsuit, plaintiffs’<sup>156</sup> first allegation was that defendants’ introduction of “Canadian” gray wolves, which are alleged to be neither threatened nor endangered, violated the requirements of ESA section 10(j).<sup>157</sup> The plaintiffs focused on the fact that the wolves indigenous to the northern Rocky Mountain region (*canis lupus irremotus*) and the Canadian wolves used for reintroduction (*canis lupus occidentalis*) were two different subspecies of gray wolf.<sup>158</sup> The plaintiffs argued that because the two types of wolves are

<sup>148</sup> *Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1355 (quoting Farm Bureaus’ First Amended and Supplemented Complaint ¶¶ 4–6).

<sup>149</sup> *See id.* at 1356.

<sup>150</sup> *See id.*

<sup>151</sup> *See id.* at 1356 n.11.

<sup>152</sup> *See id.* at 1356.

<sup>153</sup> *See Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1356; McNAMEE, *supra* note 18, at 217.

<sup>154</sup> *See Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1357.

<sup>155</sup> *See id.* at 1358.

<sup>156</sup> All three independent sets of plaintiffs will hereinafter be referred to collectively as “plaintiffs.”

<sup>157</sup> *See Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1355.

<sup>158</sup> *See id.* at 1368.

distinct subspecies, the Recovery Plan would have an adverse impact on the conservation of the *irremotus* subspecies because of possible interbreeding.<sup>159</sup>

In response, defendants asserted that the subspecies issue was not considered in detail prior to release of the wolves because FWS had reasonably determined that there were no existing wolf populations in the reintroduction area.<sup>160</sup> Assuming this was true, defendants argued that there were no wolves of the *irremotus* subspecies available to repopulate the northern Rocky Mountain area, and FWS had no choice but to draw from the Canadian gray wolf population.<sup>161</sup>

Because this case was an appeal from administrative agency proceedings at FWS, the Wyoming district court was required to handle the matter as an appeal and only overturn a decision of FWS if it was found to be arbitrary and capricious.<sup>162</sup> In its administrative proceedings, FWS, after reviewing all the evidence, concluded that the alleged impacts of the recovery program on indigenous wolves and wolf subspecies were “not significant,” and decided to go ahead with the use of Canadian gray wolves.<sup>163</sup> The district court concluded that this failure to distinguish between subspecies of gray wolf was not arbitrary and capricious because FWS “considered the relevant factors” and “articulated a rational connection between the facts found and the decision made.”<sup>164</sup> Accordingly, FWS’s use of “Canadian” wolves for the reintroduction program was upheld as reasonable by the district court.<sup>165</sup>

The plaintiffs’ second allegation stated that the defendants violated section 10(j)(2)(A) of the ESA by failing to introduce the experimental population outside the current range of the species.<sup>166</sup> In support of this contention, the plaintiffs relied on reported sightings of wolves in Yellowstone Park and central Idaho prior to and after reintroduction, asserting that such sightings proved the experimental population areas fell within the current range of naturally occurring gray wolves.<sup>167</sup> The defendants argued that FWS reasonably concluded there were no known “populations,” as defined by FWS for purposes

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<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See *Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1353 & n.1, 1369.

<sup>163</sup> See *id.* at 1368.

<sup>164</sup> *Id.* at 1369 (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994)).

<sup>165</sup> See *id.*

<sup>166</sup> See *id.* at 1355.

<sup>167</sup> See *Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1370.

of the reintroduction plan, in either of the experimental population areas (Yellowstone Park or central Idaho) prior to reintroduction.<sup>168</sup>

In order to decide this issue, the Wyoming district court decided that, because section 10(j) (2) (A) of the ESA states that experimental "populations" are to be introduced "outside the current range of such species," it was necessary to determine what the definition of "population" was for the purposes of the ESA.<sup>169</sup> At trial, FWS defined "population" as "at least 2 breeding pairs of wild wolves successfully raising at least 2 young each . . . for 2 consecutive years."<sup>170</sup> FWS based its definition on the two core concepts of species recovery: reproduction and sustainability.<sup>171</sup>

The district court in *Wyoming Farm Bureau Federation* noted that because neither the ESA nor its regulations defined "populations," FWS's agency interpretation and definition of the term were entitled to substantial deference.<sup>172</sup> Wyoming district court Judge Downes noted, however, that if an appeals court discounts FWS's definition of "population" and includes individuals of the species in such a definition, FWS may be found to have encroached upon the current range of the gray wolf in violation of section 10(j).<sup>173</sup>

Finally, the plaintiffs alleged that section 10(j) of the ESA was violated because defendants introduced an experimental population that was not "wholly separate geographically" from nonexperimental wolf populations.<sup>174</sup> Specifically, the plaintiffs asserted that: (1) the experimental populations are not capable of being wholly separate because defendants did not provide any barriers (natural or man-made) that would prevent species overlap; and (2) any species overlap would deprive the naturally occurring wolves of their endangered protections under the ESA.<sup>175</sup> To substantiate these claims of overlap, the plaintiffs again relied on the reported sightings of naturally occurring wolves in the Yellowstone Park and central Idaho areas.<sup>176</sup>

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<sup>168</sup> See *id.*

<sup>169</sup> See *id.* at 1370; Endangered Species Act, 16 U.S.C. § 1539(j) (2) (A) (1973 & Supp. 1996).

<sup>170</sup> *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1371.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 1370-71.

<sup>173</sup> See *id.* at 1372.

<sup>174</sup> See *id.* at 1355.

<sup>175</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1355. The lack of ESA protection for naturally occurring wolves was the primary concern of the environmental plaintiffs. See *id.*

<sup>176</sup> See *id.* at 1370.

At trial, the defendants put forth FWS's definition of "population" to assert that even if lone stragglers from the naturally occurring wolf population are present in the experimental population areas, this does not mean section 10(j) has been violated.<sup>177</sup> Defendants argued that the "wholly separate" geographic requirement applies only to "populations," as defined by FWS, and not individual animals or "lone dispersers."<sup>178</sup> The Wyoming district court stated that while it must defer to FWS's definition of "populations" as a permissible construction of ESA section 10(j), it required a more detailed analysis of the "wholly separate" requirement.<sup>179</sup>

For guidance, the court looked to congressional history to determine what Congress intended to protect by requiring a "wholly separate" reintroduction.<sup>180</sup> The district court found that while Congress intended to allow the Secretary, under section 10(j), to manage experimental populations with substantial flexibility, it did not intend to allow a reduction of ESA protections to existing natural populations "in whole or in part."<sup>181</sup> On the basis of its "in whole or in part" analysis, the court concluded that Congress intended to protect individual members as well as "populations."<sup>182</sup> In light of defendants' acknowledgment at trial that naturally occurring wolves did exist in Montana and would likely migrate to the experimental population areas (even if they were just lone dispersers), the court found that defendants did in fact violate the "wholly separate" requirement of ESA section 10(j) with the implementation of the wolf reintroduction program.<sup>183</sup>

Accordingly, Judge Downes ordered that the defendants "must remove reintroduced non-native wolves and their offspring from the Yellowstone and central Idaho experimental population areas."<sup>184</sup> The judge later stayed execution of his order pending appeal.<sup>185</sup>

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<sup>177</sup> *See id.*

<sup>178</sup> *See id.* at 1370, 1373.

<sup>179</sup> *See id.* at 1372.

<sup>180</sup> *See Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1372.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* at 1372, 1375.

<sup>183</sup> *See id.* at 1376.

<sup>184</sup> *Id.*

<sup>185</sup> *See Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1376.

### B. *The Ninth Circuit*

Unlike the Wyoming suit, the case of *United States v. McKittrick* was not originally brought to challenge the merits of the reintroduction program, but instead began as a criminal proceeding.<sup>186</sup>

After the Yellowstone wolf reintroduction program was implemented, one of the reintroduced wolves, an alpha male named Number Ten,<sup>187</sup> migrated from Yellowstone Park to the Red Lodge, Montana area with his mate, an alpha female named Number Nine.<sup>188</sup> Number Nine was pregnant with pups and the pair were apparently searching for a safe place for her to den.<sup>189</sup>

At the same time, a Red Lodge resident named Chad McKittrick was on his way to go bear hunting in the same area.<sup>190</sup> As McKittrick and his friend, Dusty Steinmasel, were freeing his truck from the mud where it had become stuck, McKittrick spotted a wolf standing on top of a nearby hill.<sup>191</sup> It was Number Ten, who was temporarily separated from Number Nine.<sup>192</sup> Although he was in no danger, McKittrick took a high-powered rifle out of his truck and, despite Steinmasel's pleas not to, shot Number Ten in the chest.<sup>193</sup> Steinmasel later described how he saw "the wolf spin around, bite at the wound high on his back, fall, kick his legs twice, and then lie still."<sup>194</sup> It was later confirmed that McKittrick had killed Number Ten, who, because of his size, strength,

<sup>186</sup> See 142 F.3d 1170, 1172 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999).

<sup>187</sup> Number Ten was called "the pride of Yellowstone." See Thomas McNamee, *The Killing of Wolf Number Ten*, OUTSIDE, May 1997 (visited Mar. 2, 1999) <<http://outside.starwave.com/magazine/0597/9705wolf.htm>>. He was the largest and boldest of the fourteen original wolves released into Yellowstone in January 1995. See *id.* He was a 122-pound gray and white wolf and was described as possessing "a calm, a quiet, a confidence." *Id.* His magnificence and fearless manner preordained him as an Alpha male. See *id.*

<sup>188</sup> See *id.* Number Nine was equally as magnificent as her mate, Number Ten, and was the first wolf to be released into Yellowstone Park in January 1995 (described earlier in this Comment). See *id.* Great hopes for the survival of gray wolves in the United States were pinned on this alpha pair. See *id.*

<sup>189</sup> See *id.* Number Nine's pups were also very important to the wolf recovery team since they were to be the first litter born of the experimental population since reintroduction began. See *id.*

<sup>190</sup> See *id.* McKittrick was trespassing on private land in his pursuit of hunting black bears, and did not have permission to be in the area. See *id.*

<sup>191</sup> See *id.*

<sup>192</sup> See McNamee, *The Killing of Wolf Number Ten*, *supra* note 187.

<sup>193</sup> See *id.*

<sup>194</sup> *Id.*

and bearing, had been dubbed by some wolf recovery experts as “the pride of Yellowstone.”<sup>195</sup>

After shooting and killing Number Ten, McKittrick skinned and decapitated him, taking Number Ten’s hide and head to his home.<sup>196</sup> Since these acts were in violation of the regulations established for the reintroduced wolves, McKittrick was arrested and charged with taking, possessing, and transporting Number Ten in violation of the ESA.<sup>197</sup> He was subsequently convicted by a jury on all counts and sentenced to six months in prison.<sup>198</sup>

McKittrick appealed his conviction, arguing that the wolf he killed was not protected by the ESA.<sup>199</sup> Specifically, McKittrick alleged that the gray wolf reintroduction program violated the ESA because: “(1) FWS may not draw members of an experimental population from an unlisted population, such as Canadian gray wolves; and (2) the experimental population is invalid because it is not ‘wholly separate geographically’ from naturally occurring wolves in the release area.”<sup>200</sup> These allegations seem to mirror those in the *Wyoming Farm Bureau Federation* case, but the Ninth Circuit came to quite a different conclusion.<sup>201</sup>

With regard to the first allegation, McKittrick argued that the language of section 10(j) itself restricts the Secretary to drawing members of experimental populations from populations already listed under the ESA.<sup>202</sup> If this were true, then Canadian wolves could not be used because gray wolves are not endangered in Canada, but instead are plentiful.<sup>203</sup>

The Ninth Circuit disagreed with McKittrick for two reasons.<sup>204</sup> First, the court pointed out that “gray wolves are protected by the ESA based on where they are found, not where they originate.”<sup>205</sup> Accordingly, Canadian gray wolves that migrated into the United States would be considered protected as soon as they crossed the border.<sup>206</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> See *United States v. McKittrick*, 142 F.3d 1170, 1172 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999).

<sup>197</sup> See *id.*

<sup>198</sup> See *id.* at 1173.

<sup>199</sup> See *id.*

<sup>200</sup> *Id.*

<sup>201</sup> See *McKittrick*, 142 F.3d at 1179.

<sup>202</sup> See *id.* at 1173.

<sup>203</sup> See McNAMEE, *supra* note 18, at 31.

<sup>204</sup> See *McKittrick*, 142 F.3d at 1173–74.

<sup>205</sup> *Id.* at 1173.

<sup>206</sup> See *id.*



Therefore, the court found that even though the reintroduced wolves were Canadian in origin, they were members of “any population . . . of an endangered species or a threatened species” the minute they entered the United States, and were therefore acceptable for use as a reintroduced population under the ESA.<sup>207</sup>

Second, the Ninth Circuit found that McKittrick’s interpretation “offends the statute’s essential purpose, which is the conservation of species.”<sup>208</sup> The court stated that if McKittrick were correct and FWS could only draw from listed species for reintroduction, the experimental populations could only be created by depleting threatened and endangered populations in the United States.<sup>209</sup> According to the court, this simply did not make sense, and if FWS felt it could reasonably draw wolves from the healthy Canadian population, then the wolves’ designation as experimental was proper, and the wolf shot by McKittrick was protected.<sup>210</sup>

McKittrick’s second claim was that the reintroduced wolves were not “wholly separate geographically” from the naturally existing wolf population in the area.<sup>211</sup> Therefore, he argued, the experimental population designation was invalid.<sup>212</sup> Like the plaintiffs in *Wyoming Farm Bureau Federation*, McKittrick based this argument on the sightings of individual wolves within the reintroduction area prior to reintroduction.<sup>213</sup> Drawing on the Wyoming district court’s finding that the “wholly separate” requirement applied to individuals as well as “populations,” McKittrick argued that FWS violated the “wholly separate geographically” requirement.<sup>214</sup>

The Ninth Circuit disagreed with McKittrick’s conclusions, as well as those of the Wyoming district court.<sup>215</sup> The court found that the Wyoming district court was incorrect in reading section 10(j) to apply to individual specimens as well as populations.<sup>216</sup> The Ninth Circuit determined that FWS was reasonable in interpreting the “wholly sepa-

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<sup>207</sup> *Id.* at 1174.

<sup>208</sup> *Id.*

<sup>209</sup> *See McKittrick*, 142 F.3d at 1174.

<sup>210</sup> *See id.* The court also noted the government’s point that even if the experimental population were invalid, the wolf McKittrick shot would still be protected as endangered under the ESA by virtue of simply being in the United States. *See id.* at 1174 & n.2.

<sup>211</sup> *See id.* at 1174.

<sup>212</sup> *See id.*

<sup>213</sup> *See id.* at 1175.

<sup>214</sup> *See McKittrick*, 142 F.3d at 1175.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

rate geographically” requirement to apply only to “populations.” The court stated that “this interpretation is reasonable and we decline to disturb it.”<sup>217</sup>

The Ninth Circuit ultimately rejected McKittrick’s allegations and affirmed his conviction.<sup>218</sup> McKittrick subsequently appealed his case to the United States Supreme Court, but the Court denied *certiorari* on January 11, 1999.<sup>219</sup>

The primary difference between the holdings of the *Wyoming Farm Bureau Federation* district court and the *McKittrick* court lies in their different interpretations of the word “population” and how this affected the “wholly separate geographically” requirement of section 10(j).<sup>220</sup> While both courts deferred to FWS’s definition of “population” as being “2 breeding pairs . . . raising at least 2 young each . . . for 2 consecutive years,” the courts applied that definition differently.<sup>221</sup>

The Wyoming district court found that “population” should be applied to include lone dispersers.<sup>222</sup> Since there have been lone wolves spotted in the recovery areas over the years, the Wyoming district court found that the “wholly separate geographically” requirement was violated.<sup>223</sup>

The Ninth Circuit disagreed, finding that the term “population” applied only as defined above by FWS.<sup>224</sup> Accordingly, any lone dispersers in the recovery areas were irrelevant to its analysis of the “wholly separate geographically” requirement, and the reintroduction program was upheld.<sup>225</sup>

### C. Wyoming Farm Bureau Federation v. Babbitt *Round Two*: *The Tenth Circuit*

The litigation surrounding the Yellowstone wolves did not end at the Wyoming district court or the Ninth Circuit, but instead continues. Most recently, the Tenth Circuit Court of Appeals in Denver,

<sup>217</sup> *Id.*

<sup>218</sup> *See id.* at 1178–79.

<sup>219</sup> *See* McKittrick v. United States, 119 S. Ct. 806 (1999).

<sup>220</sup> *See* McKittrick, 142 F.3d at 1175; Wyoming Farm Bureau Fed’n v. Babbitt, 987 F. Supp. 1349, 1372–73 (D. Wyo. 1997), *rev’d*, 199 F.3d 1224 (Jan. 13, 2000).

<sup>221</sup> McKittrick, 142 F.3d at 1175; Wyoming Farm Bureau Fed’n, 987 F. Supp. at 1371–73.

<sup>222</sup> *See* Wyoming Farm Bureau Fed’n, 987 F. Supp. at 1372–73.

<sup>223</sup> *See id.*

<sup>224</sup> *See* McKittrick, 142 F.3d at 1175.

<sup>225</sup> *See id.* at 1175, 1178.

Colorado heard the defendants' appeal in the *Wyoming Farm Bureau Federation v. Babbitt* case.<sup>226</sup> In a major victory for the pro-wolf forces, the Tenth Circuit issued its opinion on January 13, 2000, unanimously overturning the Wyoming district court's decision, and ordering that the reintroduced wolves be allowed to remain in Yellowstone.<sup>227</sup> It is not yet clear whether the Wyoming Farm Bureau Federation will appeal the case to the United States Supreme Court.

In its very detailed opinion, the Tenth Circuit addressed the plaintiffs'<sup>228</sup> allegations individually, as the Wyoming district court had done.<sup>229</sup> First, the court rejected the claim made by the Urbigkits that "Canadian" wolves were a genetically distinct subspecies from the Northern Rocky Mountain wolf, and therefore should not have been used in reintroduction.<sup>230</sup> The Tenth Circuit instead agreed with both the Wyoming district court and the Ninth Circuit, and held that FWS acted reasonably in concluding that the subspecies *irremotus* no longer exists.<sup>231</sup> The court reasoned that since the species no longer exists, it would be impossible to use that species for reintroduction, and therefore the "Canadian" wolves were acceptable.<sup>232</sup>

Second, the Tenth Circuit addressed the plaintiffs' allegation that FWS violated ESA section 10(j)(2)(A) by failing to release the experimental population "outside the current range of such species."<sup>233</sup> In rejecting the plaintiffs' argument, the court noted that the plaintiffs' definition of "current range," as that term is used in section 10(j), is unnecessarily rigid.<sup>234</sup> The plaintiffs argued that "current range" should mean "that territory occupied by an individual wolf."<sup>235</sup> The court noted that while Congress did not define "current range," it defined "species" as used in section 10(j)(2)(A) "to constitute distinct interbreeding population segments, . . . not individual ani-

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<sup>226</sup> See generally 199 F.3d 1224 (10th Cir. 2000).

<sup>227</sup> See *id.* at 1241.

<sup>228</sup> Apparently experiencing a change of heart, one of the original plaintiffs, the National Audubon Society, moved to dismiss its claims, realign, and join the defendants. The Tenth Circuit granted the motion. See *id.* at 1230.

<sup>229</sup> See generally *id.*

<sup>230</sup> See *id.* at 1238-39.

<sup>231</sup> See *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1239.

<sup>232</sup> See *id.* at 1238-39. The court also noted that, in any case, most wildlife experts no longer differentiate between the different subspecies of gray wolf, since many of them are extinct. See *id.* at 1239.

<sup>233</sup> Endangered Species Act, 16 U.S.C. § 1539(j)(2)(A) (1973 & Supp. 1996); *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1236.

<sup>234</sup> See *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1236.

<sup>235</sup> *Id.*

mals.<sup>236</sup> “By definition, then, an individual animal does not a species, population or population segment make.”<sup>237</sup> Because of this definition, the Tenth Circuit held that FWS and the Interior Department reasonably interpreted “current range” to be “the combined scope of territories defended by the breeding pairs of an identifiable wolf pack or population.”<sup>238</sup> Accordingly, the Tenth Circuit rejected the plaintiffs’ allegation that the reintroduction program violated the “current range” provision.<sup>239</sup>

Third, the Tenth Circuit considered the district court’s holding that the introduction of the experimental population violated ESA section 10(j)(1)’s requirement that experimental populations be “wholly separate geographically” from nonexperimental populations of the same species.<sup>240</sup> Recall that the plaintiffs argued that Congress never intended section 10(j) to lessen the ESA protections afforded to individual members of a natural population.<sup>241</sup> According to the plaintiffs, then, the sightings of “lone stragglers” from the naturally occurring population within the reintroduction area created a geographic overlap in violation of section 10(j)(1).<sup>242</sup>

The Tenth Circuit again noted that Congress, in the ESA, did not “define the relevant terms or otherwise address the precise question at issue—whether the phrase ‘wholly separate geographically from nonexperimental populations’ means that a reintroduced population of animals must be separate from *every* naturally occurring individual animal.”<sup>243</sup> The court, stating that, in the spirit of flexibility, Congress deliberately left the resolution of this issue to the Secretary, decided that it must defer to the administrative agency’s interpretation of the terms.<sup>244</sup> Given the court’s acceptance of FWS’s definition of “population” as not including lone stragglers, the Tenth Circuit determined that a “geographic separation” means that an experimental population can be established in “any area outside the area in which a particular population sustains itself.”<sup>245</sup> Because the Secretary and FWS reasonably determined that there were no “populations” of naturally

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See *Wyoming Farm Bureau Fed’n*, 199 F.3d at 1236.

<sup>240</sup> See *id.* at 1233-36.

<sup>241</sup> See *id.* at 1233.

<sup>242</sup> See *id.*

<sup>243</sup> *Id.* at 1234 (emphasis added).

<sup>244</sup> See *Wyoming Farm Bureau Fed’n*, 199 F.3d at 1234.

<sup>245</sup> *Id.*

occurring wolves within the experimental areas, the Tenth Circuit held that the "wholly separate geographically" requirement was satisfied.<sup>246</sup> The Wyoming district court was thus overruled.<sup>247</sup>

Finally, the Tenth Circuit addressed the concern of the environmental group plaintiffs that naturally occurring wolves which wander into the experimental areas will lose their endangered protections.<sup>248</sup> The Wyoming district court did not directly deal with this issue, but the Tenth Circuit settled this enforcement problem by decisively holding that "the legal protection afforded any particular wolf is clearly known, depending entirely on where the wolf is, not where it might once have been."<sup>249</sup> Accordingly, if a naturally occurring wolf wanders into the experimental areas, he or she automatically becomes reclassified as part of the experimental population, and is to be governed by the special rules established for the reintroduced wolves.<sup>250</sup>

#### V. WHO'S RIGHT? DID REINTRODUCTION VIOLATE 10(j)?

There are three main issues that must be considered to determine whether the gray wolf reintroduction violated section 10(j) of the ESA: (1) the use of "Canadian" wolves as the reintroduced population; (2) whether the reintroduced population is in the "current range" of the species; and (3) whether the reintroduced population is "wholly separate geographically" from naturally occurring wolves.<sup>251</sup> The last two issues depend on the interpretation of the definition of "population," as it applies to reintroduction.<sup>252</sup>

In light of the legal analysis which follows, this Comment concedes that if the ESA is interpreted strictly, as it was at the Wyoming district court level in the *Wyoming Farm Bureau Federation* case, the gray wolf reintroduction program could possibly be found to have violated section 10(j).<sup>253</sup> However, after considering the legislative intent behind section 10(j), this Comment concludes that the purpose of section 10(j) was to provide for more flexible interpretation and admini-

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<sup>246</sup> See *id.* at 1235-36.

<sup>247</sup> See *id.*

<sup>248</sup> See *id.*

<sup>249</sup> *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1235.

<sup>250</sup> See *id.* Presumably, the inverse applies and any reintroduced wolf which wanders outside of the experimental areas automatically receives the full endangered protection which a naturally occurring wolf would receive. See *id.* The Tenth Circuit did not specifically state this, however. See *id.*

<sup>251</sup> See *id.* at 1233-40.

<sup>252</sup> See *id.* at 1233-39.

<sup>253</sup> See generally *id.*

stration of the ESA. Accordingly, any court charged with the task of interpreting ESA section 10(j) should adopt the flexible interpretation embraced by the Ninth and Tenth Circuits.<sup>254</sup> This flexible approach should benefit not only the Yellowstone wolf reintroduction program, but all future programs as well.

#### A. Reintroduction of "Canadian" Wolves

As mentioned above, the first allegation in both *Wyoming Farm Bureau Federation v. Babbitt* and *United States v. McKittrick* was that the defendants' introduction of "Canadian" wolves, which are neither threatened nor endangered in Canada, violated the requirements of ESA section 10(j).<sup>255</sup>

The Northern Rocky Mountain gray wolf is known to scientists as *canis lupus irremotus*, and the Canadian gray wolf is known as *canis lupus occidentalis*.<sup>256</sup> Plaintiffs in *Wyoming Farm Bureau Federation* (particularly the environmental groups) alleged that *canis lupus irremotus* and *canis lupus occidentalis* are so genetically different that mixing the two subspecies would irreparably damage the survival of the *irremotus* subspecies.<sup>257</sup> The defendants argued that FWS had reasonably determined there were no existing wolf populations in the reintroduction area, and accordingly there were no wolves of the *irremotus* subspecies available to act as a reintroduced population.<sup>258</sup>

Assuming, *arguendo*, that the defendants' assertion was incorrect and *irremotus* subspecies wolves did in fact exist in the Northern Rocky Mountain region, we must turn to the ESA itself for guidance. The ESA was enacted for the purpose of providing a "program for the conservation of . . . endangered *species* and threatened *species*."<sup>259</sup> In addition, section 10(j) authorizes the release of experimental populations

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<sup>254</sup> As mentioned earlier, it is not yet clear whether the *Wyoming Farm Bureau Federation* plaintiffs will appeal the Tenth Circuit's decision to the United States Supreme Court. The analysis section of this Comment, however, will assume that an appeal will be made.

<sup>255</sup> See *United States v. McKittrick*, 142 F.3d 1170, 1173 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999); *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1355 (D. Wyo. 1997).

<sup>256</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1356 n.11.

<sup>257</sup> See *id.* at 1355–56. It should be noted here that wolves from the *irremotus* and *occidentalis* subspecies have substantially similar body frames, pigmentation, heights, and weights. See LAWRENCE, *supra* note 2, at 20. Also, interbreeding of wolf species has been occurring for quite a long time, and given these two species' proximity to each other, it can be inferred that interbreeding of the two species has already occurred. See *id.*

<sup>258</sup> See *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1368.

<sup>259</sup> Endangered Species Act, 16 U.S.C. § 1531(b) (1973 & Supp. 1996) (emphasis added).

if “such release will further the conservation of such *species*.”<sup>260</sup> The subspecies *irremotus* was mentioned when the gray wolf was first listed as endangered in 1973, but when it was relisted in 1978, the entire species of *canis lupus* was given endangered status.<sup>261</sup> Indeed, nowhere in the ESA or any of its regulations, including the special rules adopted specifically for the gray wolf reintroduction program, are subspecies mentioned.<sup>262</sup> The logical conclusion is that Congress intended the ESA to preserve the entire species of gray wolf (*canis lupus*), not to distinguish between relatively obscure subspecies variations.<sup>263</sup>

In addition, researchers note that although the gray wolf (*canis lupus*) was once divided into many subspecies, so many subspecies have become extinct that most scientists no longer differentiate between subspecies.<sup>264</sup> Scientists now typically classify wolves as belonging to one of two species: the gray wolf (*canis lupus*) or the red wolf (*canis rufus*).<sup>265</sup>

With regard to the assertion that “Canadian” gray wolves are neither threatened nor endangered and therefore are not appropriate for use as a reintroduced population, the ESA itself speaks to this charge.<sup>266</sup> It is a unique feature of the ESA that it applies state by state.<sup>267</sup> “Hence the abundance of wolves in Alaska, Canada, or Russia has no legal bearing on the question of their endangeredness in Idaho, Montana, or Wyoming.”<sup>268</sup> Thus, that gray wolves are abundant in Canada has no bearing on their status in the individual United States, and they are therefore acceptable for use as a reintroduced population.<sup>269</sup>

<sup>260</sup> *Id.* § 1539(j)(2)(A) (emphasis added).

<sup>261</sup> *See id.* § 1531.

<sup>262</sup> *See id.* §§ 1531–1544; 50 C.F.R. § 17.84 (1994).

<sup>263</sup> *See* 16 U.S.C. §§ 1531–1544; *United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999) (holding that FWS’s designation of the experimental population was proper); *Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1238–39 (10th Cir. 2000).

<sup>264</sup> *See* LAWRENCE, *supra* note 2, at 16, 18; *see also Wyoming Farm Bureau Fed’n*, 199 F.3d at 1239 (noting that the most “recent studies conclude there is very little differentiation between the many subspecies of gray wolf previously recognized.”).

<sup>265</sup> *See* LAWRENCE, *supra* note 2, at 16, 18.

<sup>266</sup> *See* McNAMEE, *supra* note 18, at 31.

<sup>267</sup> *See id.*

<sup>268</sup> *Id.*

<sup>269</sup> *See id.*

Accordingly, the defendants' use of Canadian gray wolves for the reintroduction program did not violate section 10(j) of the ESA.<sup>270</sup> The conclusions of the Wyoming district court, the Ninth Circuit, and the Tenth Circuit should be upheld if this issue is appealed to the Supreme Court.

## B. The "Population" Problem

### 1. A Definition of "Population"

Since the second and third issues in the wolf reintroduction litigation both hinge on the definition and application of "population," it is necessary, prior to analysis, to define the term.

Under administrative law rules, all three courts involved in the gray wolf litigation<sup>271</sup> deferred to FWS's definition of "population."<sup>272</sup> The current law, then, is that, with regard to wolves, "population" means "at least 2 breeding pairs . . . raising at least 2 young each . . . for 2 years," and does not include lone dispersers.<sup>273</sup>

The Ninth Circuit stated in *United States v. McKittrick* that "FWS has interpreted the 'wholly separate geographically' requirement only to apply to *populations*; this interpretation is reasonable and we decline to disturb it."<sup>274</sup> This level of deference to an administrative agency is in line with Wyoming District Court Judge Downes's own finding that FWS's definition "is not arbitrary, capricious, or manifestly contrary to the [ESA]."<sup>275</sup> In fact, Judge Downes specifically stated that "an agency's judgment is especially appropriate where the challenged decision implicates special agency expertise."<sup>276</sup> Indeed, the Tenth Circuit stated in *Wyoming Farm Bureau Federation v. Babbitt* that such scientific matters within the agency's expertise should receive substantial deference.<sup>277</sup>

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<sup>270</sup> See Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973 & Supp. 1996); *United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999); *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1369 (D. Wyo. 1997); *Wildlife and Fisheries*, 50 C.F.R. § 17.84.

<sup>271</sup> As discussed earlier, these include the Tenth Circuit, the Ninth Circuit, and the Wyoming district court.

<sup>272</sup> See *McKittrick*, 142 F.3d at 1175; *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1234; *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1371.

<sup>273</sup> *McKittrick*, 142 F.3d at 1175; *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1371.

<sup>274</sup> *McKittrick*, 142 F.3d at 1175 (emphasis added).

<sup>275</sup> *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1372.

<sup>276</sup> *Id.* at 1371.

<sup>277</sup> See *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1228-29.



Given FWS's years of intense research on wolves and wolf reintroduction, it is doubtful that there are many who know more about the subject. Accordingly, the definition of "population" falls squarely within the "special agency expertise" of FWS and, thus, courts should defer to FWS's definition.<sup>278</sup>

## 2. Current Range of Species

With the legal definition of "population" squarely in mind, the second major issue of the wolf reintroduction litigation can now be considered. The question is whether the defendants violated section 10(j)(2)(A) by failing to introduce the experimental population outside the current range of the species.<sup>279</sup>

Due to the extensive survey efforts of FWS's recovery team, it was well known that several naturally occurring wolf dens existed in Montana.<sup>280</sup> At the time, it was predicted by researchers that this naturally occurring gray wolf population, which was much larger than expected, would proliferate and disperse throughout the Northern Rocky Mountain region, including Yellowstone Park.<sup>281</sup>

It appears that such an hypothesis may have been entirely viable, given the observation by independent researchers that "wolf territories . . . are never static."<sup>282</sup> Wolf populations frequently enter new territory in search of game and thus slowly migrate throughout, and outside of, their range.<sup>283</sup> It has been noted that "[t]he wolf has the greatest natural range of any living land mammal other than man."<sup>284</sup> Accordingly, it is technically possible that the experimental population area may have been within the actual range of naturally existing wolves from Montana.<sup>285</sup> However, there is not much FWS or anyone else can do about the nomadic nature of the wolf, and FWS was diligent in its efforts to find and locate viable naturally occurring popula-

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<sup>278</sup> *See id.*

<sup>279</sup> *See id.* at 1236. Neither the Wyoming district court nor the Ninth Circuit directly addressed this issue, but instead focused on the issue of "wholly separate geographically," which is discussed in the next section of this Comment. The Tenth Circuit was the first to deal directly with the "current range" question. *See id.*

<sup>280</sup> *See* Strauch, *supra* note 106, at 45.

<sup>281</sup> *See id.* at 45-47.

<sup>282</sup> LAWRENCE, *supra* note 2, at 57.

<sup>283</sup> *See id.*

<sup>284</sup> *Id.* at 146.

<sup>285</sup> *See, e.g., id.* at 57, 146; Strauch, *supra* note 106, at 45-47.

tions of gray wolves in the Northern Rocky Mountain region.<sup>286</sup> The simple possibility that populations of wolves from Montana *may* migrate over the years to areas that *may* be within the experimental population areas should not be held to impair the validity of the wolf recovery program.<sup>287</sup>

The Tenth Circuit held that FWS reasonably defined the “current range” of naturally occurring wolves to be “the combined scope of territories defended by the breeding pairs of an identifiable wolf pack or population.”<sup>288</sup> In light of the established definition of “population” and the above discussion, this holding is reasonable and should be upheld.<sup>289</sup>

### 3. “Wholly Separate Geographically”

The third major issue in the wolf reintroduction litigation is whether defendants violated section 10(j) by introducing an experimental population which was not “wholly separate geographically” from naturally occurring wolf “populations.”<sup>290</sup>

Section 10(j) states that the term “experimental population,” for the purposes of authorized reintroduction, applies to a population “only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.”<sup>291</sup> This “wholly separate” requirement is necessary to protect natural populations of the same species and to avoid potentially complicated problems of law enforcement.<sup>292</sup> For example, in the wolf reintroduction scenario, ranchers are permitted to take actions against “experimental population” wolves that are otherwise prohibited against naturally occurring wolves (which enjoy full ESA protections).<sup>293</sup> If a rancher catches a reintroduced wolf in the act of attacking or killing livestock, he or she is entitled to harass or even kill the wolf.<sup>294</sup> If the reintroduced population did not exist “wholly sepa-

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<sup>286</sup> See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1238-39 (10th Cir. 2000).

<sup>287</sup> See *id.*

<sup>288</sup> *Id.* at 1236.

<sup>289</sup> See *id.*

<sup>290</sup> See *United States v. McKittrick*, 142 F.3d 1170, 1174-75 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999); *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1355 (D. Wyo. 1997).

<sup>291</sup> Endangered Species Act, 16 U.S.C. § 1539(j)(1) (1973 & Supp. 1996).

<sup>292</sup> See *McKittrick*, 142 F.3d at 1175.

<sup>293</sup> See *Wildlife and Fisheries*, 50 C.F.R. § 17.84(i)(3)(vii) (1994).

<sup>294</sup> See *id.*

rate[ly],” a rancher might accidentally kill a protected, naturally occurring wolf, believing it to be a problematic experimental population wolf.<sup>295</sup>

Further problems arise when the special rules governing the gray wolf reintroduction program are considered.<sup>296</sup> These special rules provide that “all wolves found in the wild within the boundaries of [an experimental population area] will be considered nonessential experimental animals.”<sup>297</sup> This directly addresses the complaint of the environmental plaintiffs in the *Wyoming Farm Bureau Federation* case that, because FWS failed to insure that the experimental and nonexperimental populations were “wholly separate geographically,” the naturally occurring wolves were essentially stripped of their ESA protections.<sup>298</sup> If the two populations do co-exist, it will be virtually impossible to distinguish between them when it comes to enforcement or regulation.<sup>299</sup>

With regard to entire *populations* of naturally occurring wolves (as defined by FWS), it is undisputed in both the *Wyoming Farm Bureau Federation* case and the *McKittrick* case that the reintroduced wolves are “wholly separate geographically” from these “populations.”<sup>300</sup> The real question is whether the reintroduced population is separate from any *lone dispersers*.<sup>301</sup>

Keep in mind, however, that, according to all three courts, the legal definition of “population” does not include lone dispersers.<sup>302</sup> Given FWS’s definition, which is entitled to deference, it would be amiss to follow Wyoming district court Judge Downes’s lead and find that the reintroduced populations were not “wholly separate geographically” from “nonexperimental *populations*” of naturally occur-

<sup>295</sup> See Causey, *supra* note 4, at 471.

<sup>296</sup> See 50 C.F.R. § 17.84(7) (iii).

<sup>297</sup> *Id.*

<sup>298</sup> See *Wyoming Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349, 1370 (D. Wyo. 1997); 50 C.F.R. § 17.84(7) (iii).

<sup>299</sup> See 50 C.F.R. § 17.84(7) (iii). Recall that the Tenth Circuit directly addressed this enforcement issue in the *Wyoming Farm Bureau Federation* case. See *Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1235-36 (10th Cir. 2000). The court solved the “lone disperser” problem by holding that the legal protection of *any* individual wolf is clearly known “depending entirely on where the wolf is, not where it might once have been.” *Id.* at 1235. This echoes the enforcement provision in the special rules (discussed above) by classifying wolves according to their geographic location and not their place of origin. See *id.*

<sup>300</sup> See *United States v. McKittrick*, 142 F.3d 1170, 1175 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 806 (Jan. 11, 1999); *Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1373.

<sup>301</sup> See *Wyoming Farm Bureau Fed’n*, 199 F.3d at 1235-36.

<sup>302</sup> See *McKittrick*, 142 F.3d at 1175; *Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1371.

ring wolves, as required by section 10(j).<sup>303</sup> Accordingly, if this matter is appealed to the United States Supreme Court, the Court should adopt the reasoning of the Ninth and Tenth Circuits and find that the Recovery Plan duly complied with the “wholly separate geographically” requirement.<sup>304</sup>

#### 4. Legislative Intent

A finding by the Supreme Court that the reintroduced wolf population was “wholly separate geographically” and was introduced outside the “current range of the species” would comply with Congress’s intent that section 10(j) programs be administered with flexibility.<sup>305</sup>

The Wyoming district court in *Wyoming Farm Bureau Federation v. Babbitt* purportedly drew on legislative history in finding that wolf reintroduction violated section 10(j) of the ESA.<sup>306</sup> Judge Downes stated that Congress, when it enacted section 10(j), “did not intend to allow reduction of ESA protections to existing natural populations in whole or in part.”<sup>307</sup> Judge Downes went on to conclude that Congress “did not intend to lessen the protections afforded to naturally occurring, or non-introduced, individual members of the same species.”<sup>308</sup> This was part of his rationale for finding that “population” should apply to individual wolves, as well as groups.<sup>309</sup>

If section 10(j) is strictly interpreted, Judge Downes may be right. As the Ninth Circuit pointed out in *United States v. McKittrick*, however, “Congress’s specific purpose in enacting section 10(j) was to ‘give greater flexibility to the Secretary.’”<sup>310</sup> The Tenth Circuit echoed this sentiment in its recent decision overturning Judge Downes’s opin-

<sup>303</sup> See Endangered Species Act, 16 U.S.C. § 1539(j) (1) (1973 & Supp. 1996) (emphasis added); see also *Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1371.

<sup>304</sup> See *McKittrick*, 142 F.3d at 1175; *Wyoming Farm Bureau Fed’n*, 199 F.3d at 1235-36.

<sup>305</sup> See *McKittrick*, 142 F.3d at 1174; *Wyoming Farm Bureau Fed’n*, 199 F.3d at 1234; H.R. REP. NO. 97-567, at 33 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2833. Congress’s intent to inject section 10(j) with flexibility also explains why this Comment does not advocate that Congress officially define some of the terms in section 10(j), such as “population,” “current range,” and “wholly separate.” See 16 U.S.C. § 1539(j). As discussed throughout this Comment, the Secretary was vested with the power to define such terms, and any interference by Congress would infringe on the Secretary’s flexible management.

<sup>306</sup> See *Wyoming Farm Bureau Fed’n*, 987 F. Supp. at 1372.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 1373.

<sup>309</sup> See *id.*

<sup>310</sup> 142 F.3d at 1174 (quoting H.R. REP. NO. 97-567, at 33 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2833).

ion.<sup>311</sup> Therefore, the whole point of section 10(j) is flexibility: flexibility in management of reintroduced populations and flexibility in administering section 10(j).<sup>312</sup>

To promote this overriding theme of flexibility, the nature of the particular species being reintroduced should be considered. As Congress itself pointed out when section 10(j) was added to the ESA, "individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent [sic] element."<sup>313</sup> The nature of a gray wolf is far different from that of virtually any other mammal.<sup>314</sup> As previously discussed, wolves are nomadic by nature, and their territorial boundaries constantly change.<sup>315</sup> This makes it difficult to set a strict boundary line for either reintroduced or naturally occurring populations, and overlap will eventually occur. This is also why "lone dispersers" from the naturally occurring gray wolf population have inevitably turned up in the recovery areas.<sup>316</sup>

Additionally, with regard to individuals and the question of "population," Congress has stated that "the purposes and policies of the [ESA] are far broader than simply providing for the conservation of . . . individual members of listed species."<sup>317</sup> This points to Congress's intent, which was recently endorsed by the Tenth Circuit, that, in the context of reintroduction, the survival of an entire species is more important than the survival of individual members of that species.<sup>318</sup> This statement is particularly important in terms of wolf reintroduction because it meshes so neatly with the overriding goal of a wolf pack—the survival of the pack.<sup>319</sup> Indeed, if the wolves themselves could be asked about this issue, they would unanimously respond that the survival of the species is of course more important than the survival of its individual members.<sup>320</sup>

<sup>311</sup> See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1234 (10th Cir. 2000).

<sup>312</sup> See *McKittrick*, 142 F.3d at 1174; *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1234.

<sup>313</sup> H.R. CONF. REP. NO. 97-835, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2871.

<sup>314</sup> See LAWRENCE, *supra* note 2, at 146.

<sup>315</sup> See *id.* at 57.

<sup>316</sup> See *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1233.

<sup>317</sup> H.R. CONF. REP. NO. 97-835, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2871.

<sup>318</sup> See *id.*; see also *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1235 (stating that "we find nothing in the Endangered Species Act that precludes steps to conserve a species in order to protect isolated individuals.").

<sup>319</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 49.

<sup>320</sup> See *id.*

In sum, in light of the legal arguments and congressional intent, the Supreme Court should uphold FWS's definition and application of "population." Additionally, in the spirit of "flexibility," the Supreme Court should find that the gray wolf reintroduction program did not violate either the "current range of species" or the "wholly separate geographically" requirements of section 10(j), and accordingly was in compliance with the ESA.

## VI. THE FUTURE OF THE YELLOWSTONE WOLVES

### A. Problems With Removal

If the Wyoming Farm Bureau Federation appeals this matter to the United States Supreme Court, and the Court opts to adopt the reasoning of the Wyoming district court in the *Wyoming Farm Bureau Federation* case, several major problems would arise.<sup>321</sup> In compliance with Judge Downes's order, the reintroduced wolves and their offspring would have to be tracked, rounded up, and removed from the recovery areas.<sup>322</sup>

The first problem which would arise is that it is doubtful that all of the experimental population *could* be recaptured. While many members of the reintroduced population are radio-collared and can be located relatively easily, not all have radio collars, and certainly few, if any, of their offspring have collars.<sup>323</sup> It has been over four years now since gray wolves were reintroduced into Yellowstone Park and central Idaho, and they have dispersed, formed packs, and likely mated and produced offspring with naturally occurring wolves.<sup>324</sup> Any attempt to round up all the reintroduced wolves would inevitably fail to locate all of the experimental population, and would probably accidentally capture members of the naturally occurring population.

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<sup>321</sup> Recall that, according to the Wyoming district court, the term naturally occurring "population" includes lone dispersers within the experimental areas. See *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1372, 1375 (D. Wyo. 1997). The importance of this distinction will become clear in the following paragraphs.

<sup>322</sup> See *id.* at 1376.

<sup>323</sup> These collars are high-tech devices that feature two darts with anesthetizing drugs attached to a standard radio-telemetry collar. See GIBSON, *supra* note 5, at 7. This allows the wolves to be tracked even at long distances. See *id.* It also enables a signal to be sent to the collar, triggering the injection of one of the tranquilizer darts, allowing recovery program administrators to examine or move a wolf, if necessary. See *id.*

<sup>324</sup> See Renee Askins, *You Really Don't Understand the News*, POST REGISTER, Jan. 18, 1998 (visited Sept. 1, 1999) <<http://www.idahonews.com/011898/opinion/12521.htm>>.

This leads to problem number two. If any members of the naturally occurring endangered population are “taken” or “harmed” during the removal, this would constitute a direct violation of section 9(a)(1) of the ESA.<sup>325</sup> Section 9(a)(1) provides that with regard to any endangered species, “it is unlawful . . . to take any such species within the United States.”<sup>326</sup> Section 3(19) of the ESA defines “take” to mean, “harass, harm, *pursue*, shoot, wound, kill, *trap*, *capture*, or *collect* . . . .”<sup>327</sup> Any capture or attempted capture of a naturally occurring gray wolf, or the offspring of a naturally occurring wolf and a reintroduced wolf, would violate the ESA and must be avoided.<sup>328</sup>

Finally, the third problem in complying with Judge Downes’s order is that even if all of the reintroduced wolves could be tracked, captured, and removed, there is nowhere for them to go. Interior Secretary Bruce Babbitt explained prior to reintroduction that, “[t]he Canadians have said no returns, no refunds. [The wolves] can’t go back to Canada.”<sup>329</sup> American zoos are already at capacity and do not have enough room for these wolves.<sup>330</sup> The only option left would be euthanasia—death.<sup>331</sup>

### B. A Solution: Remand

If the Supreme Court declines to find that the gray wolf reintroduction program complied with the ESA, the court still has an option that will save the lives of the Yellowstone wolves. Since the recovery program began as an administrative agency proceeding, the Interior Department and FWS have original jurisdiction, and the *Wyoming Farm Bureau Federation* case can be remanded to FWS.<sup>332</sup> This would give FWS the chance to “address any regulatory shortcomings in an otherwise lawful program.”<sup>333</sup>

<sup>325</sup> See Endangered Species Act, 16 U.S.C. § 1538(a)(1) (1973 & Supp. 1996).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* § 1532(19) (emphasis added).

<sup>328</sup> See *id.*

<sup>329</sup> McNAMEE, *supra* note 18, at 86.

<sup>330</sup> See *Restoring America’s Wolves* (visited Feb. 27, 1999) <<http://www.nwf.org/wolves/index.html>>.

<sup>331</sup> See McNAMEE, *supra* note 18, at 86.

<sup>332</sup> Both the Wyoming district court and the Tenth Circuit acknowledged that they were required to handle the case as an appeal from an administrative decision. See *Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000); *Wyoming Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349, 1353 & n.1 (D. Wyo. 1997).

<sup>333</sup> Brief for Intervenor-Defendants-Appellants National Wildlife Federation, Defenders of Wildlife, et al., available at <<http://www.defenders.org/ynpdbr10.html>>.

Although FWS stated in the recovery program's special rules that it does "not intend to reevaluate the 'nonessential experimental' designation," remand would give FWS the opportunity to at least consider reclassification of the reintroduced wolves.<sup>334</sup> Of course, the best way to guarantee that the reintroduced wolves remain where they are is to reclassify them all as "nonexperimental," thereby affording them full "endangered" status.<sup>335</sup> Realistically, given the bureaucratic hoops FWS would have to jump through to effect a reclassification, this would be a difficult, if not impossible, venture.

A second, and more viable, option is to reclassify the reintroduced wolves from "nonessential" to "essential."<sup>336</sup> Recall that an essential experimental population is one "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild."<sup>337</sup> As an essential population, the wolves would receive greater ESA protection and it would be more difficult to justify having them removed from the recovery areas.<sup>338</sup>

### C. A Second Solution: Withdrawal of the Suit

The *Wyoming Farm Bureau Federation* plaintiffs hold the power to effect the quickest, easiest, and most economical solution by simply withdrawing their complaints, or, after the Tenth Circuit decision, opting not to appeal to the United States Supreme Court. The plaintiffs, to be sure, might consider this a ludicrous idea, but withdrawal would, in fact, benefit the plaintiffs.

First, if the plaintiffs are correct that there are more naturally occurring gray wolves in the Northern Rocky Mountains than government researchers believed, then, given the nomadic nature of the wolf, these wolves will eventually repopulate the entire area on their own.<sup>339</sup> The problem, then, for plaintiffs is that these wolves would enjoy full ESA protections by virtue of their endangered status, and ranchers would no longer be permitted to shoot a wolf, even if they discovered it in the act of killing livestock.<sup>340</sup> No longer would the wolves be monitored and managed by FWS, and no longer could the

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<sup>334</sup> 50 C.F.R. § 17.84(10) (1994).

<sup>335</sup> See Endangered Species Act, 16 U.S.C. § 1539(j) (1973 & Supp. 1996).

<sup>336</sup> See 50 C.F.R. § 17.80.

<sup>337</sup> *Id.* § 17.80(b).

<sup>338</sup> See *id.*

<sup>339</sup> See Askins, *supra* note 324.

<sup>340</sup> See *Restoring America's Wolves*, *supra* note 330.



government relocate or kill wolves preying on livestock.<sup>341</sup> Would it not be much more advantageous for ranchers to support reintroduction and enjoy the flexible wolf management that section 10(j) provides?

Second, withdrawal of the suit now, after having lost in the Tenth Circuit, could improve the public's perception of the farm bureau plaintiffs. Public support for the wolf recovery program has been overwhelming, and the farm bureaus have generally been portrayed in the media as cold, selfish entities intent on destroying a recovered species.<sup>342</sup> The Idaho Farm Bureau Federation has stated that the "Farm Bureau is not advocating killing the non-native wolves to meet [Judge Downes's] order. We simply want them removed to meet the judge's order."<sup>343</sup>

As already noted, however, euthanasia is the only available option if the Yellowstone wolves are removed.<sup>344</sup> It would be far more productive if the farm bureaus and FWS worked together on solutions that will both save the wolves and give livestock ranchers more of the protections they are seeking.

### CONCLUSION

Human hunters were the reason the gray wolf disappeared from Yellowstone Park so many years ago.<sup>345</sup> Now, human conservationists are righting this wrong by returning the gray wolf to its historic habitat.<sup>346</sup> The Northern Rocky Mountain gray wolf recovery program has been wildly successful.<sup>347</sup> In 1995, twenty-nine wolves were returned to Yellowstone Park and Idaho.<sup>348</sup> The population of the reintroduced

<sup>341</sup> See *id.*

<sup>342</sup> See *Americans Say Wolves Should Stay* (visited Oct. 29, 1998) <<http://www.nwf.org/wolves/pollr1s.htm>>. The American Farm Bureau Federation (AFBF), one of the plaintiffs, may already be trying to distance itself from the negative publicity of the past few years. See *Victory for Wolves and Wildlife: Appeals Court Rules Yellowstone Wolves Can Stay in Park* (visited Jan. 26, 2000) <<http://www.defenders.org/releases/pr2000/pr011300.html>>. Perhaps coincidentally, AFBF President Dean Kleckner, who has long pushed for removal of the Yellowstone wolves, lost his job on the same day the Tenth Circuit opinion came out overruling the AFBF's 1997 victory. See *id.*

<sup>343</sup> Jerry Miller, *Send the Wolves Back*, *POST REGISTER*, Jan. 18, 1998 (visited Mar. 2, 1999) <<http://www.idahonews.com/011898/opinion/12520.htm>>.

<sup>344</sup> See McNAMEE, *supra* note 18, at 86.

<sup>345</sup> See *supra* notes 2–10 and accompanying text.

<sup>346</sup> See *supra* notes 17–22 and accompanying text.

<sup>347</sup> See Miller, *supra* note 343.

<sup>348</sup> See DUTCHER & BALLANTINE, *supra* note 25, at 163.

wolves has now grown to approximately 300.<sup>349</sup> In fact, the species has recovered so well that FWS is considering delisting or downlisting the gray wolf in certain areas.<sup>350</sup>

Any court reviewing the validity of this wolf recovery program should consider that, despite the extensive legal arguments for and against gray wolf reintroduction, dismantling such a redeeming human endeavor would be wrong. This is important not only for the survival of the Yellowstone wolves, but for other wolf reintroduction programs as well. Right now, there is ongoing litigation regarding the reintroduction of the red wolf in North Carolina<sup>351</sup> and the reintroduction of the Mexican wolf in New Mexico and Arizona.<sup>352</sup> With new wildlife reintroduction programs being proposed all the time,<sup>353</sup> and the fate of these programs apparently resting with the courts, judges should be careful not to undo what has been done so successfully.

In the words of one wildlife author, “[i]f we but try, and make well-informed efforts to coexist with wolves, then in a surprising number of places, we may well see what is natural and right—the return of the wolf.”<sup>354</sup>

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<sup>349</sup> See National Wildlife Federation, *Court Reversal of Wolf Removal Order “Victory for Common Sense Conservation”* (visited Jan. 26, 2000) <[http://www.nwf.org/wolves/court\\_reversal.html](http://www.nwf.org/wolves/court_reversal.html)>.

<sup>350</sup> See *Northern Rockies Wolves Could Lose Their Endangered Status* (visited Apr. 16, 1999) <<http://www.wildrockies.org/predproj/4Campaigns/FPP/Downlisting.htm>>.

<sup>351</sup> See *Case to Be Heard in Richmond on Thursday: Defenders Fight Legal Challenge of Red Wolf Program in North Carolina* (visited Dec. 26, 1999) <<http://www.defenders.org/pr102799.html>>.

<sup>352</sup> See *Mexican Wolf Wins in Court; Yellowstone Wolf Case Still Pending* (visited Dec. 26, 1999) <<http://www.defenders.org/pr102899.html>>.

<sup>353</sup> For example, FWS has proposed a wolf reintroduction program for the Northeast, including areas of Maine, New Hampshire, Vermont, and New York. See Heidi Ridgley, *Opening the Door to Wolf Recovery*, DEFENDERS, Fall 1999, at 13.

<sup>354</sup> DUTCHER & BALLANTINE, *supra* note 25, at 181.

